

**Mingo Logan Coal Co. and Mahon Enterprises, Inc.,
Joint Employers and United Mine Workers of
America.** Cases 9–CA–31797 and 9–CA–31939

September 28, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND
WALSH

On February 25, 1998, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondents each filed exceptions and supporting briefs. The Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified³ and set forth in full below.

We adopt the judge's finding that Danny Colegrove was a supervisor of the Respondents. In doing so, we find that the judge's refusal to allow Mahon Enterprises, Inc. "Mahon" and Mingo Logan Coal Co. "Mingo

Logan" to amend their answers with respect to Colegrove's supervisory status was not an abuse of discretion.

In their answers to the February 10, 1995 consolidated complaint, both Mahon and Mingo Logan admitted that Colegrove was a Section 2(11) supervisor at all material times. In the prior representation case, Case 9–RC–16382, Mahon and Mingo Logan had already stipulated that the position held by Colegrove, assistant foreman, was a supervisory position. Mahon again admitted that Colegrove was a supervisor in its answer to the August 21, 1996, amended complaint. Although in its answer to the amended complaint Mingo Logan denied that Colegrove was a Mingo Logan supervisor, it did not specifically deny that Colegrove was a Mahon supervisor. It was not until after the first week of trial, during which several employees testified to unlawful statements made by Colegrove, that Respondents shifted their position on Colegrove's status and asserted that he was not a supervisor of the Respondents. The judge denied the Respondents permission to belatedly amend their answers under these circumstances.

The judge, however, did allow Mahon to make a full record of its position on Colegrove's supervisory status by permitting Mahon to make an offer of proof by questions and answers, and Colegrove was allowed to testify at length regarding his status. In concluding that Colegrove was a supervisor, the judge did not rely solely on the Respondents' admissions, but undertook a thorough examination of all the evidence, including Colegrove's testimony at the hearing and during the prior representation case, as well as the testimony of other employees and a foreman. Accordingly, we do not find that the Respondents were prejudiced by the judge's ruling.

Moreover, even assuming that Colegrove was neither a supervisor nor an agent of the Respondents, we find that there is sufficient evidence to support the judge's findings that Mingo Logan was unlawfully motivated when it caused Mahon to lay off the 18 employees on April 10, 1994, because of their union support, and that Mahon was unlawfully motivated when it participated with Mingo Logan in the identification, selection, and layoff of those employees. As detailed by the judge, the credited testimony concerning the statements and actions of the Respondents' supervisors and agents besides Colegrove clearly establish that the layoff of the employees was based on their union activities.

AMENDED CONCLUSIONS OF LAW

1. Respondents Mingo Logan Coal Co. and Mahon Enterprises, Inc. are joint employers.

2. By discriminatorily laying off 18 employees on April 10, 1994, Respondents Mingo Logan and Mahon have engaged in unfair labor practices affecting com-

¹ The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondents' exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit. We also reject the Respondents' assertion that a statistical analysis of the judge's credibility resolutions in this and prior cases establishes bias in favor of labor unions. Applying such an analysis would amount to judging a case by a mechanical formula rather than on the merits of the evidence. See *Fieldcrest Cannon, Inc. v. NLRB*, 132 F.3d 1007, 1010 (4th Cir. 1997).

² We shall conform the conclusions of law to the violations found by the judge.

³ We agree with the judge that Respondent Mahon discriminatorily laid off 18 employees on April 10, 1994, at Respondent Mingo Logan's behest. We therefore find that Mahon must, jointly with Mingo Logan, offer the 18 employees employment and make them whole for the loss of earnings and benefits, computed on a quarterly basis from the date of their layoff to the date of a proper offer of employment, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See, e.g., *J. J. Gumberg Co.*, 189 NLRB 889, 893 (1971). We shall reserve for compliance the determination of when the employees would have been transferred to the Mingo Logan payroll, and thus when they would have begun receiving Mingo Logan wages and benefits, in the absence of the Respondents unlawful discrimination.

We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

merce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

3. By coercively interrogating employees, by threatening them with loss of jobs, closure of the mine, and that they would not be placed on the Mingo Logan payroll for engaging in union activity, by refusing to transfer employees to the Mingo Logan payroll because of their union activity, and by otherwise interfering with their right to engage in union activity, the Respondents violated Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Mingo Logan Coal Co. and Mahon Enterprises, Inc., Wharncliffe, West Virginia, jointly and severally, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or causing another employer to lay off any employee for supporting United Mine Workers of America or any other union.

(b) Coercively interrogating any employee about union support or union activities.

(c) Threatening any employee with loss of job, closure of the mine, or not being transferred to the Mingo Logan payroll for engaging in union activity.

(d) Refusing to transfer employees to the Mingo Logan payroll because they engaged in union activity.

(e) Interfering with any employee's right to engage in union activity.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer the following employees employment to their former jobs at the Mountaineer Mine or, if those jobs no longer exist, to substantially equivalent positions:

Thomas Bailey	Buddy Maynor
Harold Bryant	David Massey
Truman Cameron	James Osborne
Jerry Canterbury	Glen Payne
Michael Dillon	Rupert Smith
John Eanes	Jerry Tawney
Dennis Evans	Joseph Turner
Dennis Hall	Stewart Vint
Ralph Jarrell	Carl Workman

(b) Make the above-named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

(c) Within 14 days from the date of this Order, remove from their files any reference to the unlawful layoffs, and within 3 days thereafter notify the above-named employees in writing that this has been done and that the layoffs will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at the Mountaineer Mine near Wharncliffe, West Virginia, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1994.

(f) Within 21 days after service by the Region, file with the Regional Director sworn certifications of responsible officials on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Section 7 of the Act gives all employees the following rights

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off or cause another employer to lay off any employee for supporting United Mine Workers of America or any other union.

WE WILL NOT coercively question you about union support or union activities.

WE WILL NOT threaten you with loss of job, closure of the mine, or that you will not be placed on the Mingo Logan payroll for engaging in union activity.

WE WILL NOT refuse to transfer you to the Mingo Logan payroll for engaging in union activity.

WE WILL NOT interfere with your right to engage in union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer the following employees employment to their former jobs at the Mountaineer Mine or, if those jobs no longer exist, to substantially equivalent positions:

Thomas Bailey	Buddy Maynor
Harold Bryant	David Massey
Truman Cameron	James Osborne
Jerry Canterbury	Glen Payne
Michael Dillon	Rupert Smith
John Eanes	Jerry Tawney
Dennis Evans	Joseph Turner
Dennis Hall	Stewart Vint
Ralph Jarrell	Carl Workman

WE WILL make the above-named employees whole for any loss of earnings and other benefits resulting from their April 10, 1994 layoffs, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs, and WE WILL, within 3 days thereafter, notify each of the above-named employees in writing that the layoffs will not be used against them in any way.

MINGO LOGAN COAL CO.

Eric A. Taylor, Esq., for the General Counsel.

Forrest H. Roles and Christopher I. Slaughter, Esqs. (Smith, Heenan, & Althen), of Charleston, West Virginia, for Mingo Logan.

George J. Oliver, Esq. (Smith, Helms, Mulliss, & Moore), of Raleigh, North Carolina, for Mahon.

Molly Kettler Wade, Esq., of Charleston, West Virginia, for the Union.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These consolidated cases were tried in Logan and Charleston, West Virginia, on January 21–24, February 24–28, and March 3–6, 1997. The charges were filed April 18 and June 21, 1994.¹ Consolidated complaints were issued February 10, 1995, and August 21, 1996, and amended at the trial.

Mingo Logan Coal Co. (Mingo Logan) is a wholly owned subsidiary of Ashland Coal, Inc. In January 1992 it began operating the large, high-production Mountaineer underground coal mine near Wharncliffe, West Virginia. Using both continuous miner and longwall means of extracting coal, it produces five or six times the tonnage of an average coal mine and plans to begin developing a second seam of coal on a lower level.

Clearly with purposes of (1) keeping its own work force nonunion, (2) saving about \$6 an hour in labor costs, and (3) obtaining the work of skilled, unemployed union miners without hiring them directly, Mingo Logan entered into a labor contract with Mahon Enterprises, Inc. (Mahon) to perform outby (nonproduction construction and support) work, much of which is necessary for the life of the mine. The contract provides for the performance of this outby work and "Miscellaneous other work as required" (which often included inby production work).

There is evidence that although these contract employees—consisting mostly of union miners—were on Mahon's payroll, their essential terms and conditions of employment were code-determined by Mingo Logan and Mahon. Mingo Logan referred union applicants to Mahon for hiring. It assigned, directed, and supervised Mahon employees at will. It monitored their work, determined when they must be disciplined, and began rotating them with its own employees. It effectually controlled their compensation by limiting Mahon's reimbursement to \$12 an hour for general laborers, \$13 for operators and crew leaders, and \$15 for foremen, firebosses, and electricians, plus an undisclosed contracting fee. Hiring them as "temporary" workers, Mahon provided them no fringe benefits (no paid vacations, holidays, pensions, etc.), except limited health insurance and minimal life insurance. (Mingo Logan paid an \$18 minimum rate and provided full benefits to the underground employees on its own payroll.)

Maintaining its own work force of outby (as well as inby) employees and supervisors, Mingo Logan each week determined not only the type of work for Mahon employees to perform and the number of employees, but also their required skills. At the beginning of each shift, it divided the work be-

¹ All dates are in 1994 unless otherwise indicated.

tween Mingo Logan and Mahon employees. Some Mahon employees worked in separate groups under a Mahon foreman or crew leader; others worked alongside Mingo Logan employees on inby or outby work under the supervision of Mingo Logan foremen. Both Mahon and Mingo Logan employees worked on Mahon crew leader David Massey's belt crew on the owl (third) shift, under written and oral instructions from the day-shift Mingo Logan belt foreman. Individually assigned Mahon employees worked directly under the supervision of Mingo Logan foremen assigning them.

Mahon had a large turnover of its employees, working for the lower wages and benefits. As President Amon Mahon admits, he "had discussions continually with people like [Mingo Logan's Administrative Services Director James] Mooney and [General Mine Superintendent Clifton] Frye, always to try to hang onto as many people and . . . to add as many people as possible." There came a time, however, in May 1993 (after the completion of much of the mine's infrastructure), when "it looked like that I was going to be forced to reduce people, but from my conversations with Mr. Mooney and Mr. Frye, they got in their mind set that they needed X amount of people at the mines each day." Amon Mahon therefore changed the workweek at that time, reducing the Mahon employees' scheduled working days from 6 days on and 1 day off, to six on and two off—allowing him to keep 25 percent of the work force home and "have flexibility in case of absentee or someone off."

In October 1993, leaving more outby work to be performed at lower cost by Mahon employees, Mingo Logan reduced all its underground employees' hours from 10 to 9 hours a day. It also began rotating Mahon employee with the Mingo Logan employees.

In early January 1994, the Union began an organizing campaign. There is evidence that, in response, Mingo Logan and Mahon supervisors engaged in extensive interrogations and threats, including threats to close the mine. In March a Mahon supervisor revealed to one employee that Amon Mahon had said in a meeting that "we're going to take 20" or so of the "oldest men" who were "involved in the union activity" and lay them off or fire them "to make them an example to everybody else." A few days before the April 10 layoffs the supervisor revealed to another employee that there was going to be a lay-off and that David Terry, Mingo Logan's general construction coordinator, was in the Mahon office going over the list of names.

Planning the layoffs during the organizing campaign—although only about a fifth of the mine had been developed—Mingo Logan prepared a proposed budget on March 24–25 to cover the labor costs of an *all Mingo Logan* work force after phasing out the Mahon employees. The proposal provided for an annual *net increase* of 13,228 in scheduled hours. This would be accomplished by (a) increasing the working hours of 140 of the 258 underground mine employees, (b) adding four inby jobs, and (c) initially eliminating 17 outby jobs performed by Mahon employees. James Mooney calculated that the changes would increase Mingo Logan's annual labor costs by \$375,402.

Despite this increase in the budgeted labor costs, Mingo Logan approved the proposal. About 5:30 p.m. on Saturday,

April 9, Coordinator David Terry notified Amon Mahon that Mahon's complement of 91 outby employees must be reduced by 18 to 73 employees, including the layoff of skilled operators and crew leader David Massey. On Sunday, April 10, Amon Mahon telephoned and summarily laid off the 18 employees, 17 of whom had signed union authorization cards—effectively ending the Union's organizing campaign in the mine.

The primary issues are (a) whether Respondents Mingo Logan and Mahon were joint employers of Mahon employees, (b) whether they unlawfully coerced their employees, and (c) whether they discriminatorily laid off the 18 Mahon employees, violating Section 8(a)(1) and (3) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Mingo Logan, Mahon, and United Mine Workers of America (the Union), I make the following

FINDINGS OF FACT

I. JURISDICTION

Mingo Logan, a corporation, mines and processes coal at its underground mine near Wharncliffe, West Virginia, where it annually ships goods valued over \$50,000 directly outside the State. Mahon, a corporation, annually provides Mingo Logan with labor and construction services valued over \$50,000. The Respondents admit and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Mingo Logan, a wholly owned subsidiary of Ashland Coal Co., leased coal mining rights in a mountain near Wharncliffe, West Virginia, to operate a very large, high-production longwall mine, which produces about five or six times the tonnage of an average coal mine. It plans to begin developing a second seam of coal on a lower level "partly while we're mining this one and after this one." (Tr. 714, 1358–1359, 1362, 1364, 1999.)

This Mountaineer mine required extensive preparatory work with continuous miners, making 10 parallel entries (tunnels, called the South and North Mains), extending north inside the mountain over 4 miles. For each of the longwall panels, which measure 1000 feet wide and up to 9000 feet in depth (on the east and west sides of the Mains), continuous miners are used by inby crews to make a three-entry headgate and tailgate on either side of the panel (as well as three entries on the far, east or west, end of each panel) for ventilation, conveyor belt, and rail track. (Tr. 1228, 1232–1233, 1372–1377, 1381–1385; RML Exh. 3.)

As the longwall shearer excavates all the coal in the panel along the 1000-foot face (cutting 1-meter strips of coal at a time), the coal is transported (after being crushed at the stage loader) on conveyors outby to the Mains and outside the mine, then by overland conveyor to the preparation plant where the rock, shale, and sandstone are separated out (Tr. 1365–1366, 1402–1408, 1417–1418, 1448–1450, 1842).

Continuous miners (about 20 to 30 feet in length) are used by inby production crews not only to extract the coal in the miles of entries in the Mains, headgates, tailgates, and other entryways, but also to mine the coal in smaller sections of the mine that are not suitable for longwall mining. Continuous miners were initially used by Mahon outby crews to follow the production crews and do rock work to increase the height of some of the entries for the tracks and conveyor belts. (Tr. 1225, 1234, 1396–1400.)

Other Mahon outby work included installing motor rail tracks, conveyor belts, trolley wire, and high voltage cable, excavating and constructing overcasts, building belt-track crossings, building brattices (stoppings of cinder blocks for separating incoming fresh air and outgoing exhaust air), and installing fresh water and drainage pipes. It also included much support work, such as maintaining all equipment used, examining, cleaning, rock-dusting, and repairing belts, making belt and power moveups, maintaining continuous miner equipment on weekends, and providing supply crew for continuous miner sections and construction sites, as well as “Miscellaneous other work as required.” (Tr. 1424–1431; ML Exh. 3 pp. 19–20.)

Mingo Logan’s superintendent, Clifton Frye, began overseeing the development of the mine in May 1991. In June 1991, Mingo Logan engaged mine contractor LARC, Inc. to open and begin operating the mine, assisted by Mahon contract labor doing outby work. In late January 1992, Mingo Logan took over the operation, and Mahon continued doing much of the outby construction and support work. In the fall of 1992, the longwall mining began. A year later in October 1993, Mingo Logan cut the scheduled hours of all its underground employees from 10 to 9 hours a day. This eliminated much of their scheduled overtime, leaving more outby construction and support work for the lower-paid Mahon contract employees to perform. (Tr. 1359–1360, 1418–1419, 1446–1447, 1453, 1482–1484, 1674, 1825–1826, 2050.)

In early January 1994 the Union began organizing the underground employees (Tr. 617). About 5:30 p.m. on April 9, as discussed later, Mingo Logan notified Amon Mahon that Mahon’s complement of 91 outby employees must be reduced by 18 to 73 employees. On Sunday, April 10, Amon Mahon telephoned and summarily laid off the 18 employees. All except one of them had signed union authorization cards (GC Exhs. 3, 8, 10, 13, 15, 16, 18–21, 23–25, 28–30; Tr. 550–551). The layoffs effectively ended the Union’s organizing campaign in the mine. The Union did not get any more cards signed (Tr. 622).

On April 28, 1994, the Union filed its petition in Case 9–RC–16382 (Bd. Exh. 1a). In the representation proceeding the Board on August 13, 1996, issued its Decision on Review and Order (GC Exh. 1vv), finding “that Mingo Logan and Mahon are the joint employers of Mahon’s employees.” On August 28, 1996, the Regional Director approved the Union’s August 26 request to withdraw its petition (GC Exh. 1yy). On January 24, 1997, the Board, on appeal from my order granting the General Counsel’s motion in limine, directed that the Respondents be permitted “to offer any additional evidence relevant to the joint-employer issue and to reconsider the Board’s finding in the

representation case in light of any such additional evidence” (Tr. 640, 651–653; GC Exh. 1uu).

B. Joint Employers

1. Supervision and direction of Mahon employees

a. One management group

On February 26, 1992, about a month after taking over the operation of the Montaineer mine from contractor LARC, Mingo Logan employed Mahon’s general mine foreman, James Allen, as Mingo Logan’s evening shift foreman. Soon after Allen assumed this new position in the mine, he bypassed Mahon President Amon Mahon and talked directly to Mahon employee Stewart Vint about taking the job of motorman operator, in charge of getting mine supplies to the production and construction crews. Vint agreed to the reassignment and took the job on the condition that “I take direct orders from you and you alone” and that Allen would inform every Mahon and Mingo Logan foreman that “when I speak it’s you speaking.” (Tr. 1197–1199, 1244–1246; GC Exh. 34.) Vint worked under Allen’s supervision until late 1992 (Tr. 1200).

In this same conversation, as Vint credibly testified, Allen revealed to Vint that “there was a lot of disorder going on” in the mine because of two management groups, one Mahon and one Mingo Logan, and “they were going to bring all the management group under one roof,” to better direct the work force (Tr. 1206–1207). Vint impressed me very favorably on the stand as a truthful witness. I discredit Allen’s denials (Tr. 1828–1830).

Following through on its one-management plans, Mingo Logan later hired David Terry as an assistant shift foreman (who had succeeded James Allen as Mahon’s general mine manager), Charles McDaniel (a Mahon foreman), and also Henry Shaffer (Tr. 1170, 1207, 1688, 1828; GC Exh. 34; RML Exh. 7). David Terry, who is “responsible for the entire mine on all three shifts” in the absence of Mingo Logan’s general mine foreman, Harrison Blankenship, serves as Mingo Logan’s general construction coordinator with Mahon (Tr. 1666).

Maintaining its own work force of outby (as well as inby) employees, Mingo Logan employed a full staff of foremen over outby work: Maintenance Foremen Dannie Morgan, John Morgan, and John Cochran; Construction/Relief Foremen David Cantrell, Donald Sparkman, and Gary Acord; Belt Foreman Lowell “Tommy” Cook; and Assistant Belt Foremen Aubrey Lusk, Orville Wyant, and Malcolm Walls (Tr. 1207, 1170; RML Exhs. 7, 8).

Mingo Logan exercised full control over the work Mahon employees would perform. Each week it determined not only the type of work and the number of Mahon employees, but also the Mahon employees’ required skills (Tr. 1474–1477, 1504, 1676–1677, 1679–1680, 1706–1707). Mingo Logan foremen would meet with the Mahon shift foreman at the beginning of each shifts and inform him how the work would be divided between Mahon and Mingo Logan employees. Some Mahon employees worked in separate groups under a Mahon foreman or crew leader; others worked alongside Mingo Logan employees on inby and outby work, under the supervision of Mingo Logan foremen. After the Mahon shift foreman assigned Mahon employees in the separate groups, Mingo Logan fore-

men would often reassign selected Mahon employees as needed to work with Mingo Logan employees under Mingo Logan supervision. (Tr. 589–590, 748–749, 860–863, 1632–1636, 1669–1771, 1832–1836, 1959, 1964–1965, 2033–2034, 2167, 2215–2216.)

b. Mingo Logan supervision and direction

In June 1992, Mingo Logan's longwall superintendent, Earl Cooke, interviewed Dennis Evans, an unemployed, longtime union member. Instead of employing him, Cooke introduced him to Lenville Mahon (an admitted agent of Mahon), who placed him on the Mahon payroll. Cooke told Evans that if hired, "I would [have] my foot in the door to get a job with" Mingo Logan. About August or September 1992, Evans asked Cooke if he could work on the longwall. Cooke (without consulting with Mahon) said yes and told the Mahon foreman that Evans was to report on the longwall maintenance team the following day. This was inby work, performed at the face of the longwall alongside Mingo Logan employees under Mingo Logan supervision. (Tr. 469, 472, 810, 814–822; GC Exh. 1bbb.)

Evans performed this Mingo Logan inby work, which sometimes included operating the shearer in coal production, for an estimated 11 to 14 months. Mingo Logan kept his time in the longwall office. About the only reason Evans ever had to go to the Mahon trailer was to pick up his paycheck. (Tr. 475, 815, 823–824, 832.) He continued doing this inby work under Mingo Logan supervision, even though Mingo Logan and Mahon signed a so-called "Construction Work Agreement" on December 23, 1992, covering outby work and providing that Mahon shall "direct" and "supervise" its own employees. (ML Exh. 3 pp. 1, 10, 19–20.)

Hoping to be hired by Mingo Logan, Evans often volunteered to work on one of his days off when requested by Mingo Logan. He specifically remembered working on December 31, 1992 when asked by Mingo Logan's shift foreman, James Allen. (Tr. 817–818.) He sent in four or five resumes "by various foremen who wanted me on, to no avail." Finally about October 1993, Mingo Logan's longwall maintenance foreman, Alvin Jewell, "tried his best to get me on his team." This time, as Evans credibly testified contrary to Jewell's denials, Jewell revealed that "he overheard the talk in the office and they were not going to hire me because of my brother," a union organizer, International Representative Bernard Evans. (Tr. 476, 486–487, 498–499, 1850–1851.) By then, as discussed later, Mingo Logan attorneys had given the Mingo Logan foremen a 6-hour training course in opposing union organization.

In late 1992 Allen again bypassed Mahon and asked Stewart Vint if he wanted to work on the longwall. Vint began training for the job and joined Evans on the Mingo Logan longwall maintenance team, spending part of the time operating the shearer. Vint worked several months with Evans on this inby work under Mingo Logan supervision, until both of them and other Mahon employees working on longwall maintenance were reassigned. At Jewell's request, Evans had trained all new Mingo Logan longwall maintenance employees. (Tr. 198–199, 473–474, 816, 833, 853, 1131, 1200–1203, 1211, 1220, 1266, 1845–1846, 2066.)

There were other Mahon employees who also worked under Mingo Logan supervision.

James Allen helped Jerry Canterbury in getting employed by Mahon, as Allen admitted at the time, contrary to his testimony (Tr. 742–744, 1830–1831). Canterbury often worked for one or more days in coal production on a continuous miner section in the absence a member of a production crew. On these assignments, he worked under the supervision of Mingo Logan's continuous miner foreman, Thomas Foster, James Goins, or Gerald Mullins—not under a Mahon foreman. He estimated that this happened about 20 times during his employment. (Tr. 745–749, 765, 779–780.) Goins also assigned Stewart Vint to operate a shuttle car for about 2 weeks in the Thanksgiving 1993 period (Tr. 1241–1242).

Similarly, as Mahon employee Joseph Turner credibly testified, Mingo Logan's continuous miner foremen, Thomas Foster and Bill Rose, often selected him to work on their crews, sometimes for 2 or 3 days or for a week. When several Mingo Logan crew members were off on vacation, three or four Mahon employees would fill in. Contrary to the denials (Tr. 1915–1916, 2115–2116), Turner would sometimes work one day with Foster and the next with Rose. Anytime "anybody was off on those two crews they would come and get me most all the time." (Tr. 860–862.) Sometimes Foster or Rose would ask the Mahon foreman, "like a ritual or something," but after Turner began working on a section, "it's like automatic . . . They didn't have to come and ask [the] Mahon foreman." (Tr. 872.)

Mahon employee Michael Dillon credibly testified that at the time of his April 10 layoffs, Mahon's evening shift foreman, James Hawkins, was his immediate supervisor, but that Mingo Logan's construction/relief foreman, David Cantrell, and assistant shift foreman, Charles McDaniel, were also supervising him (Tr. 380–381).

After much evasion, Shift Foreman Hawkins reluctantly admitted that when a Mahon employee filled in for a Mingo Logan employee on a continuous mining section during the period 1993 until April 10, 1994, the Mahon employee would be working "at the direction of and under the supervision of the Mingo Logan foreman" in Hawkins' absence (Tr. 2180–2193). I discredit Mahon Mine Foreman Larry Caldwell's testimony to the contrary (Tr. 2231–2234). Both Hawkins and Caldwell appeared willing on the stand to give fabricated testimony.

On outby power moves (moving up high voltage cable), Jerry Canterbury worked with Mingo Logan employees under the supervision of Mingo Logan's construction/relief foreman, Gary Acord, and on outby belt moves, under the supervision of Mingo Logan's assistant belt foreman, Aubrey Lusk or Orville Wyant (Tr. 756–760). Mahon employee Kenneth Day (who quit on April 6 when recalled to another job), also worked on belt and power moves. When asked who his supervisor was at the time he quit, he credibly answered: "There was several different ones. Dave Cantrell [a Mingo Logan construction/relief foreman] was one of them [and James] Allen [Mingo Logan's shift foreman on the evening shift]." (Tr. 432–433.)

During the March 29, 1994 longwall move, as Canterbury credibly testified, his foreman was Mingo Logan's construction/relief foreman, Donald Sparkman (Tr. 454, 462, 465; RML Exh. 5 p. 2). I discredit Sparkman's denials (Tr. 1341).

Stewart Vint credibly testified that Mingo Logan's shift foreman, Carlos Porter, routinely directed his work on the owl shift (Tr. 164, 215, 1203–1206, RML Exh. 1 p. 1). Regarding Mahon employees taking directions from Carlos Porter (as well as Evening Shift Foreman James Allen), Amon Mahon claimed, "To my knowledge they haven't, no. That's not the way it was intended to be." (Tr. 1134.) Amon Mahon did not impress me as being a candid witness on the stand.

Vint also credibly testified that during the longwall moves, when Mingo Logan for safety needed experienced Mingo Logan and Mahon motor operators on the motors, which were "like a train locomotive," to move the heavy longwall shields, he worked under the direction of Carlos Porter and Porter's assistant, Charles McDaniel (Tr. 1208–1209). As indicated, Vint impressed me very favorably on the stand as a truthful witness. I discredit McDaniel's and Porter's denials (Tr. 1169, 1637, 1662–1663). I note that in Vint's pretrial affidavit, he did not recognize Mahon foremen as being actual supervisors. Stating his opinion, he asserted in the affidavit that after the Mahon bosses were made into Mingo Logan bosses, "Mingo Logan issues all of the orders." (RML Exh. 1 p. 2).

Mahon employee James Osborne was hired after Carlos Porter referred him to both Mahon's manager, Lenville Mahon, and Mingo Logan's shift foreman, James Allen. He talked to them and was hired by Mahon. (Tr. 520.) He was another Mahon employee who worked as a motor operator moving the longwall shields on the March 29 longwall move. Mahon employees Dennis Evans and Joseph Turner also worked on that longwall move, along with a Mingo Logan crew leader. (Tr. 521, 834, 865.)

After being taken off the longwall maintenance team, Dennis Evans worked about 6 or 7 months on an outby longwall setup team (setting up the spare longwall for the next longwall move). Evans, who appeared on the stand to be a truthful, trustworthy witness, credibly testified that he worked on Mingo Logan longwall crew leader Johnnie Gower's team with Mahon employee Troy Porter, under the supervision of Mingo Logan's longwall move foreman, Delmer Bowman. Other Mingo Logan and Mahon employees were working together on separate longwall setup teams. (Tr. 474–475, 834–837; GC Exh. 38; RML Exhs. 7, 8.) Bowman claimed that he did not "directly" supervise Evans, except when he was doing something unsafe (Tr. 1318–1319, 1326–1327).

Mahon employee Rupert Smith, hired in August 1991, worked on the day shift about 2 years "running [the] parts bus," answering to Mingo Logan's general construction coordinator, David Terry. In the second year on this job, Smith asked Lenville Mahon if he could have a week's (unpaid) vacation. Lenville Mahon "said it's not up to me, you've got to talk to Dave Terry." (Tr. 563–564.)

Mingo Logan electrician Gary Amick credibly testified that between the time he was hired on November 10, 1993, until April 10, 1994, it was routine on the owl shift for Mahon employees to be working alongside Mingo Logan employees, operating equipment. "It was a frequent thing. I mean it was more [like] every night or every other night." Amick recalled that one of the Mingo Logan supervisors who supervised them was construction/relief foreman, Donald Sparkman. (Tr. 720,

723–725.) He also credibly testified that a "lot of times" when he was making equipment repairs, Mahon employees assisted him. He recalled one night when he was adding cable onto a feeder, Mingo Logan's construction/relief foreman, Sparkman, sent two Mahon employees with him "to help us load cable and load the pinner up on the flat car and bring it back off the mains." (Tr. 725–726.) Again I discredit the Sparkman's denials (Tr. 1342). He did not appear on the stand to be a credible witness.

Amick also recalled that "practically every morning" from November 1993 to April 10, 1994, as he was leaving the owl shift, he overheard Mingo Logan's belt foreman, Lowell Cook, giving instructions to Mahon employee David Massey (Tr. 730–733).

Mahon employee Glen Payne, who worked on the owl shift from December 1993 to April 10, 1994, credibly testified that although he worked under Mahon's shift foreman, David Lovejoy, Sparkman frequently gave him orders to perform various tasks. Payne also worked for Mingo Logan's shift foreman, Carlos Porter; assistant shift foreman; Charles McDaniel; and assistant belt foreman, Aubrey Lusk. (Tr. 590, 787–794, 800, 1182–1183.) At the beginning of the owl shift, after he received instructions from Lovejoy in the Mahon trailer, "you'd walk up a big set of steps to . . . where you enter the mine, and a lot of times your job would be changed right there . . . a lot of times by Mingo Logan bosses" (Tr. 589–590).

At the time of his layoff on April 10, Mahon employee Ralph Jarrell was working as a general laborer on the owl shift. When asked "who was your immediate supervisor at the time," he credibly answered: "Carlos Porter was the mine foreman, and Gary Acord [a Mingo Logan construction/relief foreman] was the boss." (Tr. 282–283, 309.)

Mahon crew leader David Massey credibly testified that Carlos Porter or Charles McDaniel would take members of his belt crew if "a roof bolter, or shuttle car operator, or scoop operator, whatever" was needed on a coal producing (continuous miner) section (Tr. 906). He recalled—from notes he made on Lowell Cook's January 27 instruction sheet—that Carlos Porter said on that occasion he was running short-handed, needed a member of Massey's belt crew "to help build cribs and set timbers in another part" of the mine, and took employee Randall Stafford with him from Massey's crew (Tr. 916–917; UMW Exh. 11).

c. Supervision of belt crew on owl shift

(1) Daily instruction sheets

Mahon's owl shift foreman, David Lovejoy (who did not testify), played no role in the supervision of the belt crew on the owl shift. Lowell Cook, Mingo Logan's belt foreman on the day shift, assumed full responsibility for supervising that belt work. (Tr. 40.)

Lowell Cook issued daily written instructions, which were addressed to Mahon crew leader David Massey and one or two Mingo Logan outby employees working on the belt crew, with a copy addressed to Mingo Logan's owl shift foreman, Carlos Porter (sometimes to his assistant, Charles McDaniel). Massey went to the Mingo Logan office to pick up copies, without conferring with Porter. Massey received further instructions, sometimes including employee assignments, from Cook in

mornings before the beginning of the day shift when Massey reported on the work done. (Tr. 90–91, 104–108, 111, 145, 886, 906–908.)

Massey saved the instruction sheets (Tr. 142), eight of which were first introduced in evidence at the representation hearing (UMWA Exhs. 9–12 and 13A through D) and six additional ones at the trial (GC Exhs. 5–7, 45–47). The instructions detail not only what work was to be done, but often how to perform the work and sometimes which employees were to be assigned.

The August 17, 1993 instruction sheet, addressed to Mingo Logan outby employees Jack Casteel and Edward Adams and to David Massey (UMWA Exh. 9), *assigns work* to new crew members, stating in item 1A: “There will be 4 men starting tonight on owl shift. These people need to see Carlos [Porter] prior to going underground. *These people are to work on recovery of the 8RT belt* [emphasis added]. Start recovering the short belt first.” (Tr. 908–910.)

The December 11, 1993 instruction sheet, addressed to “David Massey (Crew Leader)” and Mingo Logan outby employee David Booth (UMWA Exh. 13D), shows (in Massey’s handwriting) that Dave (Booth) worked with Mahon employees Randy (Randall Stafford) and John (Parsons) in performing the following work in item 2: “Make a splice on the longwall belt at 3LT.” (Tr. 928–929, 1780–1781; GC Exh. 38; RML Exh. 8.) Massey credibly testified: “We was all in the same crew” (Tr. 2306–2307). I discredit Lowell Cook’s denials (Tr. 1773–1774). By his demeanor on the stand, Lowell Cook appeared to be a most untrustworthy witness, who was willing to fabricate any testimony that might help his employer’s cause.

The January 4, 1994 instruction sheet, addressed to Massey and Mingo Logan outby employees James Evans and Timothy Bassham (GC Exh. 46), shows that Cook assigned work to Bassham as a member of the crew, stating in item 2: “Continue to align the coupling on 8RT A. Must have help from maintenance group. T Bassham.” (Tr. 1794–1797.)

The February 3, 1994 instruction sheet, addressed to Massey, David Booth, and Timothy Bassham (GC Exh. 45), forbids the assigning of certain work to Mahon crew members, stating in item 2: “Mount the fluid coupling on 8LT A. Hubs will need [to be] place[d] on the shaft. Tim Bassham & 1 maintenance man. If we do not get help we cannot do the job. *Do not use any beltmen other than Bassham on this job* [emphasis added].” (Tr. 1789–1793.)

The February 22, 1994 instruction sheet, addressed to Timothy Bassham and Massey (GC Exh. 5), begins by *assigning overtime work*, stating in item 1: “Due to the work load this week *everybody will need to work one of their days off starting Wednesday* [emphasis added].” The remainder of the instructions illustrate how detailed Lowell Cook’s instructions were:

(2) Take the Belt Drive cement subframes to 25 CC and unload for the Drive Installation. Unload material neatly on the work site.

(3) Help move the tail piece at 1LT B inby to Bk 14½. The chute was made freestanding today. However there will be a need to place troughs on both sides and a dribble chute. Place the 42” structure under the chute skin to skin.

(4) We must have two men rolling up 42” belt on the old Left Mains System. We are out of 42” belt in the yard. Cut the

belt only at splices. Roll up in 400’ lengths. The scoop is in the face of North Mains, the winder is at 30 CC. Knock out a stopping across from the spur at 30 CC to get in #3 Entry. [Mingo Logan’s general mine foreman, Harrison] Blankenship, said we’ll be able to leave this out until we recover the belt. Bring rolls of belt outside.

(5) Turn the blade over on 2nd Primary Wiper.

The March 4, 1994 instruction sheet, addressed to Massey and David Booth (GC Exh. 6), illustrates Lowell Cook’s personal supervision of the Mahon crew members, stating in item 3: “Who place[d] the rollers in the CC at Booster[?] Whoever it was need to go back & do the job right. *I also want to talk to these people tomorrow* [emphasis added].” (Tr. 65–67.)

The March 8, 1994 instruction sheet, addressed to Massey and David Booth (UMWA Exh. 10), *assigns work to a Mahon employee*, stating in item 3: “Vulcanizer will be here tonight to start making repairs. Make the splices with ply damage first. Place *Bill McClung* on this job.” (GC Exh. 38.) Cook claimed: “I did not assign him to that job. His talents put him on that job.” (Tr. 911–915, 1778.)

The March 10, 1994 instruction sheet, addressed to Massey and James Evans (GC Exh. 47), *assigns the same Mahon employee to two different tasks*. In item 1 it states: “Vulcanizers will be here tonight to make a repair on the 72” South Mains Belt. Make splice #18 first. Put *Bill McClung* on this job.” In item 7 it states: “Fill and run the Duster [for rock dusting] at Portal. *Bill can do this* [emphasis added] after the splices get started.” (Tr. 1798–1799.)

All of the instruction sheets are addressed to one or two Mingo Logan outby employees as well as to Massey. As indicated, on one of the sheets (dated December 11, 1993, UMWA Exh. 9), Cook addresses Massey as “Crew Leader”—never as “Foreman.”

I discredit Cook’s denial that he supervised any Mahon employee (Tr. 397, 1758).

(2) Status of David Massey

When hired in July 1992 as a general laborer for \$12 an hour installing a 72’ belt, David Massey was already a certified foreman and emergency medical technician (EMT), with 14 years of mining experience in union mines (Tr. 34). In early 1993 Mingo Logan’s belt foreman Lowell Cook selected Massey to be the belt crew leader on the owl shift. Massey first declined, stating “I just wanted to be a belt man.” A day or two later, however, when Cook told him “it would be like putting your first step in the door” for getting a Mingo Logan job, Massey agreed and became a crew leader. Mahon then raised his wage from \$13 to \$14 an hour. (Tr. 949–950, 1019–1020.)

A short time later, Lowell Cook told Massey “I think you need another dollar on the hour. You’re getting all your work accomplished . . . and *I ain’t heard no rumors on you* [emphasis added],” referring to rumors of union support. (There had been “union talk” in the mine ever since Mingo Logan took over the operation, Tr. 476, and Mingo Logan foremen had been given a 6-hour training course in opposing union organization, as discussed later.) As Massey further credibly testified, Lowell Cook and Massey went to Mahon’s trailer, where Cook told Lenville Mahon that he thought Lenville Mahon “ought to give

me another dollar on the hour pay raise so that's when I went up to \$15 an hour." (Tr. 35, 950–951).

Massey's March 19, 1993 application for employment by Mingo Logan shows that by that date, his wage rate had already been raised to \$15 an hour and that his job title was still "Crew Leader on 72" belt work" (RML Exh. 2 p. 4).

Massey (who impressed me most favorably as a truthful, sincere witness by his demeanor on the stand) credibly testified that he was never told by any Mingo Logan or Mahon supervisor that he was a foreman and that Amon Mahon never referred to him as a foreman (Tr. 2303–2304). A contemporary list of the 29 persons employed by Mahon on the owl shift in December 1993 or January 1994, names only two foremen, Jim Auxier and David Lovejoy. Massey is named first in the list of nine employees under "Belts," indicating his status as belt crew leader. (Tr. 968–969, 1270–1271; GC Exh. 37.) Also, as discussed above, Lowell Cook named Massey on the December 11, 1993 instruction sheet (UMWA Exh. 13D) as "David Massey (Crew Leader)."

The evidence is clear that neither Mingo Logan nor the Mahon employees regarded Massey as a foreman. A Mahon shift foreman joined Mingo Logan foremen in the foremen's assembly area before the beginning of each shift to discuss the work to be done, but Massey was not invited to attend on the owl shift. Like Mahon employee Troy Porter, who went to the Mingo Logan office to pick up orders for his outby longwall setup crew, Massey picked up the instruction sheets there for the belt crew. (Tr. 100, 474, 1731, 889–890, 1964–1965.)

When Lowell Cook told Massey that two belt crew members had not adequately serviced a belt head that went down 2 days later, as Massey credibly testified, he responded, "I can't do nothing about it, they told me they serviced it." Cook said "we're going to have to do something to discipline them." Massey then responded: "Tommy, I can't do that . . . that's your job . . . I'm just a crew leader." Cook then said "I'll get with [Lenville Mahon] and we'll make up a paper and get [the] two boys to sign it." (Tr. 2340.)

When Massey presented this disciplinary paper to the two employees, both employees refused to sign it, one telling Massey that "you ain't no more a boss than a man in the moon . . . you're just my crew leader and you're a worker just like we are." (Tr. 2339–2341). I discredit the denial and the contrary account of what happened by one of the two Mahon crew members, Kenneth Evans, who since then has been hired by Mingo Logan (Tr. 2331–2338; RML Exh. 8 p. 2). On another occasion Cook informed Massey how to draft a training statement showing that Massey (as a certified foreman) had trained employees on servicing a belt head. Massey reported back to Cook that an employee refused to sign it. (Tr. 123–127; RM Exh. 1.)

I find that Mingo Logan and Mahon, in contending they were not joint employers, fabricated claims that Massey was a foreman and supervisor (Tr. 101–102).

After claiming that Massey was "our third shift belt foreman" in the first quarter of 1994, Amon Mahon admitted that there are no payroll records designating Massey as a foreman, that he does not recall ever telling Massey he was designated a foreman, that he has no personal knowledge that anybody else

ever told him, and that Massey never referred to himself as a foreman. Amon Mahon testifies that his rate for a crew leader was \$13 an hour, or on occasion \$14 an hour if someone "had foreman papers," and claims that "when [Massey's] pay changed to \$15 a hour, that would have been the time he became the foreman." (Tr. 2036–2037, 2058–2060, 2066). To the contrary, as found above, Massey's March 19, 1993 application for employment by Mingo Logan shows that by that date, his wage rate had already been raised to \$15 an hour, but his job title was still "Crew Leader on 72" belt work" (RML Exh. 2 p. 4).

It is undisputed, as Massey credibly testified, that when Massey and others went to Amon Mahon's office to ask questions after the April 10 layoffs, Amon Mahon "looked at me and he said I . . . [knew] a lot about everything in the mines and was one of the best workers"—nothing about his being a foreman (Tr. 59–60).

Lenville Mahon claims that Massey "was our belt foreman," but does not claim that he ever told Massey. He does deny the credited testimony that Lowell Cook in Massey's presence requested that Massey get a dollar an hour raise. (Tr. 2141–2142.) I discredit his denial.

Lowell Cook claims that both Massey and Lenville Mahon told him that Massey would be a foreman. He denies telling Massey that if he would take the crew leader job, it could be the first step to getting hired directly by Mingo Logan. He denies that he had anything to do with Massey securing a raise and that he recommended it. (Tr. 1732–1733, 1760, 1804.) After being shown his December 11, 1993 instruction sheet listing Massey as a crew leader, Lowell Cook testified (Tr. 1780–1781):

Q. Now you keep on characterizing David Massey as a foreman. David Massey was, in fact, a crew leader was he not?

A. He was the foreman.

Q. Despite the fact that you call him a crew leader.

A. *I didn't call him a crew leader* [emphasis added].

Q. That is, in fact, your handwriting [on the instruction sheet], isn't it, sir?

A. It appears to be.

Q. You're saying you didn't call him a crew leader but you designated him as a crew leader on this particular sheet, correct?

A. He's the foreman. Crew leader, foreman, they're the same [contrary to Amon Mahon's testimony (Tr. 2036–2037)].

There is no credible evidence that Massey had any supervisory authority as crew leader of the Mahon employees on the belt crew. He credibly testified that he worked "just as hard" as the others, usually on "the hardest . . . most dangerous" jobs. In assigned the work to the Mahon crew members, he followed the oral and written instructions from Lowell Cook and huddled with his crew members at the beginning of the shift in making the other assignments—taking into consideration who were riding to work together. (Tr. 106, 144–145, 154–155, 902, 913.) I find that Massey's assignments of the general laborers on the

belt crew were merely routine, not requiring the use of independent judgment (GC Exhs. 37, 38).

Massey credibly testified that he and the Mingo Logan employee or employees on the instruction sheet had the responsibility for overseeing that the work on the owl shift was done. "I'd usually check to make sure everything was all right," walking by to "see how they're doing," but "It was too big a list for one man to try to track down." Massey did not direct or discipline the crew members. He as well as Mingo Logan employees on the belt crew reported to Lowell Cook before the day shift what work had been done. (Tr. 89, 106-108, 111-113, 148-149, 902-904, 907, 2312.) When Mingo Logan outby employee Timothy Bassham (a certified mine foreman) was in his crew, Bassham "would always make the big decisions on the main jobs that was critical because . . . like I told them I ain't had my bossing papers long and . . . I can't make calls on shots like that and take a chance of getting somebody hurt" (Tr. 961).

I discredit, as fabricated, the testimony that Massey was a supervisor.

d. Contentions and findings

Largely ignoring the credited evidence detailed above, showing the extent to which Mingo Logan supervised and directed Mahon employees, Mingo Logan contends in its brief (at 31-32) that its "occasional and sporadic supervision and direction of Mahon employees is simply insufficient under appropriate Board law" for establishing a joint employer status.

In making this contention in its brief (at 26-27), Mingo Logan primarily relies on the Board's decision in *Island Creek Coal Co.*, 279 NLRB 858, 864 (1986), which I find is inapposite. Mingo Logan erroneously represents in the brief (at 27) that in that case, there were "numerous occasions when [mine operator] Island Creek supervisors [emphasis added] directed the work of [labor contractor] L&M employees by telling them what areas they were to work in, and giving them routine directions and work instructions [more] than this record reflects."

To the contrary, the Board in that case affirmed findings by the administrative law judge, who cited examples of instructions and assignments by Island Creek "engineers" (not supervisors) and found that "This type of instruction to the L&M crew was *not supervisory instruction in the normal sense* [emphasis added]." The judge further found that Island Creek officials' telling L&M employees who operated hydroseeding equipment "what areas were to be seeded," then leaving "to the employees to perform in a competent and professional manner . . . is merely routine directions" and "do not in any sense make the . . . officials supervisors [emphasis added] of the L&M personnel."

The other Board decision upon which Mingo Logan primarily relies in its brief (at 26-29) is in *Martiki Coal Corp.*, 315 NLRB 476, 477-478 (1994), which I also find is inapposite. In that case, as here, (mine owner) "Martiki supervisors had managed and directed the work of [labor contractor] Charles Clearing employees on a regular and substantial basis." The Board held that Charles Clearing and Martiki were joint employers," but that before the relevant time period, Martiki "effectively severed the joint-employer relationship." Among other

changes, "Martiki supervisors *ceased giving instructions* [emphasis added] to Charles Clearing employees."

Clearly, Mingo Logan did not cease supervising and directing Mahon employees before the critical period in this case, from January through April 10, 1994. As found:

Mingo Logan's Belt Foreman Lowell Cook was still assuming full responsibility for supervising Mahon crew leader Davis Massey and other Mahon employee members of the outby belt crew working with Mingo Logan employees on the owl shift.

Mingo Logan's Longwall Move Foreman Delmer Bowman was still supervising Mahon employees working with Mingo Logan employees on the outby longwall setup teams.

Mingo Logan's Longwall Move Foreman Bowman, Shift Foreman Carlos Porter, Assistant Shift Foreman Charles McDaniel, and Construction/Relief Foreman Donald Sparkman were supervising Mahon employees working with Mingo Logan employees on the March 29, 1994 longwall move.

Mingo Logan's Construction/Relief Foreman Gary Acord was still supervising Mahon employee Jerry Canterbury on outby power moves.

Mingo Logan's Assistant Belt Foremen Aubrey Lusk and Orville Wyant were still supervising Mahon employee Jerry Canterbury on outby belt moves.

Mingo Logan's Evening Shift Foreman James Allen and Construction/Relief Foreman David Cantrell were still supervising Kenneth Day when he quit on April 6.

Mingo Logan's Construction/Relief Foreman David Cantrell and Assistant Shift Foreman Charles McDaniel were still supervising Mahon employee Michael Dillon, even though Mahon's Shift Foreman James Hawkins was his immediate supervisor.

Mingo Logan's Shift Foreman Carlos Porter, Assistant Shift Foreman Charles McDaniel, Assistant Belt Foreman Aubrey Lusk, and Construction/Relief Foreman Donald Sparkman were still supervising Mahon employee Glen Payne, even though he was working under Mahon's Shift Foreman David Lovejoy.

Mingo Logan's Shift Foreman Carlos Porter and Construction/Relief Foreman Gary Acord were still supervising Mahon employee Ralph Jarrell.

Although Mingo Logan supervisors were still supervising these Mahon employees on outby work as well as on some inby work on the March 29, 1994 longwall move (contrary to the December 23, 1992 "Construction Work Agreement," which provided that Mahon shall "direct" and "supervise" its own employee), Mingo Logan contends that here, as in *Martiki Coal Corp.*, supra, the joint-employer relationship had been "effectively severed" before the January-April 10 period.

To make this contention, Mingo Logan simply ignores its continued supervision of Mahon outby work. It first points out in its brief (at 22) that "by the summer of 1993, the Mahon employees [Dennis Evans and Stewart Vint] had been moved off the [inby] longwall maintenance crew." It then makes the unfounded argument: "By the time of the events alleged in the

complaint occurred, the Mingo Logan employees were doing all the [inby] *production* [emphasis added] work.”

To support this argument, Mingo Logan cites its mine superintendent’s, Clifton Frye, testimony (Tr. 1514). Frye testified that the substitution of Mahon employees on production sections for absent Mingo Logan employees “occurred more often” in 1992 and the first part of 1993, but claimed that by 1994, “*it pretty much* [emphasis added] wasn’t occurring. If it did . . . it was almost minute. I don’t remember it occurring then.” To the contrary, Mahon’s shift foreman, James Hawkins, admitted that when a Mahon employee filled in for a Mingo Logan employee on a continuous mining section until April 10, the Mahon employee would be working under the supervision of the Mingo Logan foreman (Tr. 2193). Mahon employee Buddy Maynor credibly testified that when he was laid off on April 10, he was occasionally doing inby production work “to help out if somebody was off” (Tr. 321).

Mahon contends in its brief (at 6) that “to the extent that Mahon employees ever performed” some production work, it ceased after 1993. In support of this contention, Mahon erroneously represents that President Amon Mahon’s testified (Tr. 2052) that Mingo Logan’s administrative services director, James Mooney, “reminded” Amon Mahon in late 1993 that “*no Mahon employee* [emphasis added] was to work as a substitute for any Mingo Logan employee on a production unit.” Instead, Amon Mahon testified that Mooney said “he simply did not want it to happen again and wanted my timesheets to be done in such a way that . . . if they did occur . . . that I had to report it to him.” (Tr. 2052, 2073–2079; LM–6.)

I reject Mingo Logan’s contention that by the time of the February–April period, “the Mingo Logan employees were doing all the production work.” I reject Mahon’s contention that all production work by Mahon employees ceased after 1993.

I further find that even if no Mahon employee was performing any inby production work in the January–April period, this change in the previous practice did not effectively sever any joint-employer relationship. As found, Mingo Logan’s supervisors were still supervising Mahon employees in the performance of outby work—contrary to the facts in *Martiki Coal Corp.*, supra, in which the Board found that “*Martiki supervisors ceased giving instructions* [emphasis added] to Charles Clearing employees.”

2. Codetermining essential conditions of employment

a. Labor contract as subterfuge

On December 23, 1992, about 11 months after Mingo Logan took over the operation of the Mountaineer mine, it signed with labor contractor Mahon a so-called “Construction Work Contract,” which obviously was not intended to reflect the actual relationship between Mingo Logan and Mahon and the actual practice in the mine at that time.

In early 1992, as discussed above, Mingo Logan had found “a lot of disorder going on” in the mine because of two management groups, one Mahon and one Mingo Logan. Its solution was to bring “all the management group under one roof,” to better direct the work force of Mingo Logan and Mahon employees. It hired Mahon’s general mine foreman, James Allen,

on February 26, 1992, as a Mingo Logan shift foreman. It next hired David Terry, who had succeeded Allen as Mahon’s general mine manager, to serve as its general construction coordinator with Mahon. It also hired from Mahon’s staff, as assistant shift foremen, Charles McDaniel and Henry Shaffer.

Mingo Logan then, as found, exercised full control over the work Mahon employees would perform. Each week it determined not only the type of work and the number of Mahon employees, but also the Mahon employees’ required skills. Its foremen would meet with the Mahon shift foreman at the beginning of each shift and inform him how the work would be divided between Mahon and Mingo Logan employees. Some Mahon employees worked in separate groups under a Mahon foreman or crew leader; others worked alongside Mingo Logan employees on inby and outby work, under the supervision of Mingo Logan foremen. After the Mahon shift foreman assigned Mahon employees in the separate groups, Mingo Logan foremen would often reassign selected Mahon employees as needed to work with Mingo Logan employees under Mingo Logan supervision. Mingo Logan’s belt foreman, Lowell Cook, assumed full responsibility for supervising the owl shift belt crew, consisting of a Mahon crew leader and other Mahon employees, working with Mingo Logan employees.

In early fall of 1992, several months before Mingo Logan and Mahon signed the December 23, 1992 “Construction Work Contract,” the longwall operation began. Coordinator David Terry admitted that Mingo Logan then increased its use of Mahon employees on production crews for the remainder of 1992 and early 1993. He claimed it was because Mingo Logan was not able to hire a sufficient number of employees. (Tr. 1674.)

In fact, there were many skilled, experienced unemployed union miners being hired by Mahon. Amon Mahon admitted that 80 percent or more of his employees had worked in union mines (Tr. 1076). Mingo Logan was reluctant to hire them directly. As an example, Mingo Logan refused to hire Dennis Evans, an unemployed union miner, even though he had 14 or 15 years experience, had an associates degree in mining technology, and could run “practically any underground mine machinery” (Tr. 469). Instead (as Evans credibly testified) Mingo Logan’s longwall superintendent, Earl Cooke, after interviewing Evans, “told me that he would introduce me to another man and that if this man hired me that I would [have] my foot in the door to get a job with” Mingo Logan. Then, as found, Cooke introduced him to Lenville Mahon, who hired him on June 9, 1992.

On December 23, 1992, when the labor contract was signed—providing that Mahon shall “direct” and “supervise” its own employees—Dennis Evans had been working full time for months on a Mingo Logan inby longwall maintenance team, doing maintenance and sometimes production work under Mingo Logan supervision. Mingo Logan continued to assign Evans to perform this inby work for several more months, along with Mahon employee Stewart Vint. Further disregarding the provisions of the labor agreement, Mingo Logan was assigning work to Mahon employees on Mingo Logan’s continuous miner production teams, as well as on its outby construction teams, under Mingo Logan supervision.

Section 9 of the labor agreement provides that Mahon not only “shall employ, direct, supervise, discharge, and fix the compensation and working conditions of its employees,” but also “shall be solely and exclusively responsible for and shall exercise complete control of its employees in all matters, disputes, or grievances arising out of, or in anyway, connected with its work under this Agreement” (ML Exh. 3 p. 10).

After considering the codetermining by Mingo Logan and Mahon of the assignment, direction, and supervision of Mahon employees, as well as the codetermining of other conditions of their employment as described below, I find Mingo Logan signed the so-called “Construction Work Contract” in part as a subterfuge, to prevent the finding of a joint-employer relationship with Mahon.

b. Conditions of employment

Besides the assignment, direction, and supervision of Mahon employees, the evidence reveals that Mingo Logan and Mahon codetermined other conditions of employment.

Hiring of employees. The labor contract provides that Mahon shall employ its own employees. As a practical matter, however, it hired union miners when referred by Mingo Logan. It had no incentive for refusing to hire these referred employees, inasmuch as Mingo Logan would compensate it for hours worked. Mingo Logan was reluctant to directly hire unemployed union miners and wanted Mahon to place them on its payroll. This would enable Mingo Logan to have the services of these skilled, experienced coal miners, at lower wages, while screening them to add to its nonunion work force. (Tr. 520–521, 742–743, 810, 1455–1456; GC Exh. 34.)

Promotions. In early 1993, as found, Mingo Logan’s belt foreman, Lowell Cook, selected Mahon employee David Massey to be the belt crew leader on the owl shift, telling him that taking the added responsibility “would be like putting [his] first step in the door” for a Mingo Logan job. Massey agreed to serve as crew leader, and Mahon raised his wage from \$13 to \$14 an hour. A short time later, Cook complimented Massey’s work and told him “I ain’t heard no [union] rumors on you.” (As found, there had been “union talk” in the mine ever since Mingo Logan took over the operation, and Mingo Logan foremen had already been given a 6-hour training course in opposing union organization.) As Cook suggested, Mahon gave Massey another raise from \$14 to \$15 an hour.

Preventing Promotions. Mahon had a policy of promoting general laborers to operators when they operated mining equipment, raising their pay from \$12 to \$13 an hour. But when Mahon general laborer Joseph Turner was operating equipment most of the time and asked Lenville Mahon for a raise, Lenville Mahon said “it wasn’t up to him to give a raise,” that “Mingo Logan only allowed them to have so many operators.” (Tr. 221–222, 867–868.) Amon Mahon testified that he set the wages of employees and that his rate for equipment operators was \$13 an hour, and claimed that Mingo Logan had no “authority or control over that process.” He earlier admitted, however, that at the time of the April 10 layoffs, three Mahon employees were doing “operator type work” and were being paid only \$12 an hour because “I just didn’t have the room to

pay them” \$13. (Tr. 1061, 1094–1095, 2036; Mahon brief at 17.)

Rotating Shifts. Mahon employee Stewart Vint credibly testified that when he asked Mingo Logan’s general construction coordinator, David Terry, why Mahon employees were being rotated to the day shift, Terry explained that “some Mahon employees were complaining” and “the way he was going to settle that argument” was to rotate them “with Mingo Logan employees” (Tr. 1229, 1279–1280). I discredit Terry’s denial that this conversation occurred. He also denied having authority to have Mahon employees to rotate, but admitted on cross-examination that “Somebody with Mingo Logan had the authority.” (Tr. 1678, 1704–1705.)

Changing Schedules. In the last quarter of 1993 when Mingo Logan began rotating Mahon employee with its employees, Mingo Logan’s belt foreman, Lowell Cook, adjusted the schedule and, at the request of Mahon employee Tim Casto, permitted him to stay on the evening shift. Cook, instead of Mahon, “picked the guys to be in each group.” (Tr. 945, 998.) I discredit Cook’s denials (Tr. 1757–1758).

Workweek. Mingo Logan caused Mahon to change its workweek. Mahon had a large turnover of employees, working for the lower wages and benefits. As President Amon Mahon admits, he “had discussions continually with people like [Mingo Logan Administrative Director, James] Mooney and [Mine Superintendent Clifton] Frye, always to try to hang onto as many people and . . . to add as many people as possible.” There came a time, however, in May 1993 (after the completion of much of the mine’s infrastructure) when “it looked like that I was going to be forced to reduce people, but from my conversations with Mr. Mooney and Mr. Frye, they got in their mind set that they needed X amount of people at the mines each day.” Amon Mahon therefore changed the workweek, reducing the Mahon employees’ scheduled working days from 6 days on and 1 day off, to 6 on and 2 off—allowing him to keep 25 percent of the work force home and “have flexibility in case of absentee or someone off.” (Tr. 2055, 2112; RML Exh. 5.)

Overtime. Mahon employee Stewart Vint credibly testified that he was required to work overtime, either by Mahon or by a Mingo Logan supervisor, “it just depended on what job I was doing.” He recalled that when he worked overtime on the longwall maintenance crew, Mingo Logan’s longwall maintenance foreman, Alvin Jewell, told him he had to work overtime on those occasions. (Tr. 1243.)

Also as found, Mingo Logan’s shift foreman, James Allen, asked Mahon employee Dennis Evans to work on December 31, 1992. “They had to change a head drive out on the longwall and they needed extra workers” (Tr. 817). As further found, Mingo Logan’s belt foreman, Lowell Cook, began his February 22, 1994 instruction sheet to Mahon and Mingo Logan employees on the owl shift belt crew with the assignment of overtime, stating in item 1: “Due to the work load this week everybody will need to work one of their days off starting Wednesday.”

Required Skills. Mingo Logan not only determined the work to be performed by Mahon employees in the mine, as its Mine superintendent, Clifton Frye, testified, but it also determined their required skills (Tr. 1476).

Time Off. Mahon employee Rupert Smith credibly testified, as found, that after working about 2 years “running [the] parts bus,” answering to Mingo Logan’s general construction coordinator, David Terry, he asked Lenville Mahon if he could have a week’s (unpaid) vacation. Lenville Mahon “said it’s not up to me, you’ve got to talk to Dave Terry.”

Discipline. Although Amon Mahon testified that he had control over the decisions about the discipline of Mahon employees (Tr. 2035), Mingo Logan monitored the work and decided when disciplinary action must be taken. As an example, Mahon employee Jerry Canterbury credibly testified about an incident when he was changing batteries on a motor and the uncoupled rock duster started rolling. He could not stop it and the rock duster hit some air-lock doors. Lenville Mahon called him on his day off and said that Mine Superintendent Clifton Frye “was upset over the doors getting hit” and “thought some disciplinary action needed to be taken.” Without giving Canterbury an opportunity to be heard, Mahon recognized Frye’s message as a directive and gave him a 3-day suspension. (Tr. 768–769.)

On another occasion Mingo Logan’s belt foreman, Lowell Cook, “was upset” and complained to Amon Mahon “that we weren’t adequately performing our job” because two Mahon employees in crew leader David Massey’s belt crew had not adequately serviced a belt head that went down 2 days later. Although Massey “didn’t think it was a fair assessment,” a disciplinary letter was prepared for the employees’ files. (Tr. 2061–2064, 2340–2341.)

Lowell Cook’s March 4, 1994 instruction sheet to David Massey’s belt crew shows that Cook handled a disciplinary matter himself. As found, Cook not only asked “Who place[d] the rollers in the CC at Booster[?]” and stated, “Whoever it was need to go back & do the job right.” He then added on the instruction sheet, “I also want to talk to these people tomorrow.”

Wage Rates. I find that Mingo Logan effectually controlled the compensation of the Mahon employees by limiting Mahon’s reimbursements to \$12 an hour for general laborers, \$13 for operators and crew leaders, and \$15 for foremen, firebosses, and electricians, plus an undisclosed contracting fee (redacted from the contract in evidence). This contracting fee was large enough to compensate Mahon for such employer expenses as workers compensation, but for no fringe benefits except “limited health insurance and minimal life insurance.” The fee was also large enough to permit Mahon to pay certain amounts above the \$13 and \$15 reimbursements, such as \$15.50 for Mahon’s shift foremen, James Hawkins and David Lovejoy, on the evening and owl shifts and \$16 to Mahon’s mine foreman, Larry Caldwell, on the day shift. (Tr. 1051–1053, 1147–1148, 1904–1906, 2036–2037, 2042, 2060, 2102; ML Exh. 3; Mahon brief at 20, 64.)

The extent of Mingo Logan’s control over the Mahon employees’ compensation is shown by its limitation on the number of employees in classifications above general laborer. As found, Amon Mahon admitted that three Mahon employees being paid \$12 as general laborers at the time of the April 10 layoffs were actually working in a \$13 operator classification, but they were not promoted because he “just didn’t have room” (in the allotted number of operators authorized by Mingo Logan).

The evidence shows that the total cost to Mingo Logan for the Mahon contract employees was about \$6 lower than the total cost of employees on Mingo Logan’s payroll.

Mingo Logan paid a minimum of \$18 and maximum of \$19 for its underground employees and provides them with 10 or more days a year vacation, 10 holidays, medical and dental insurance, life insurance, attendance bonus, bereavement pay, retirement plan, and 401(k) plan (Tr. 1590–1591). The average total labor costs for Mingo Logan employees (not supervisors) was over \$29 an hour (Tr. 1879, 2129–2130). The evidence does not reveal what the average would be if the supervisors were included.

Mingo Logan Administrative Director James Mooney calculated that in the first quarter of 1994, Mingo Logan paid Mahon an average amount of \$23.69 an hour for all its employees *and* supervisors, *including* overtime (Tr. 2133).

3. Concluding findings of joint employers

The Board has long followed the standard set out in *TLI, Inc.*, 271 NLRB 798 (1984), for determining joint employer status. There the Board held, as found in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982), that “where two separate entities share or *codetermine* those matters governing the *essential terms and conditions of employment*, they are to be considered joint employers for purposes of the Act” (emphasis added). The Board further held, citing its decision in *Laerco Transportation & Warehouse*, 269 NLRB 324 (1984), that “to establish such status there must be a showing that the employer meaningfully affects matters relating to the employment relationship *such as hiring, firing, discipline, supervision, and direction*” (emphasis added).

Apart from other conditions of Mahon employees’ employment discussed above, I find that Mingo Logan meaningfully affected the hiring, discipline, supervision, and direction of the Mahon employees and that Mingo Logan and Mahon were their joint employers. Whether Mingo Logan also meaningfully affected the firing (or unlawful layoff) of Mahon’s employees is a separate question, discussed later.

C. Extensive Interrogation and Threats

1. By Mingo Logan supervisors

Mingo Logan stated in a position letter on June 6, 1994, that it “denies each and every allegation” that “certain Mingo Logan supervisors made statements to Mahon employees in violation of the Act” (GC Exh. 42 p. 7). At the trial, despite the credible evidence that Mingo Logan supervisors engaged in extensive coercive interrogation and threats of Mahon employees during the organizing campaign in 1994 before the April 10 layoffs, a number of its supervisors were prepared to support Mingo Logan’s position at the trial and categorically deny that this coercion occurred. One of them was Lowell Cook.

Belt Foreman Lowell Cook. Mahon crew leader David Massey credibly testified that Lowell Cook repeatedly interrogated him about whether he signed a union card (Tr. 44, 52–53), asked him how many cards he thought were signed (Tr. 53–55), informed him that if they found out who signed union cards they would never be considered to be hired by Mingo Logan (Tr. 45, 55), instructed him to tell the employees work-

ing for him on the belt crew that their jobs would be “on the line” (laid off or fired) if the Union came in (Tr. 40), said that he and his workers ought to put “Just Say No” stickers on their hats (Tr. 41), and told him they should not sign union authorization cards (Tr. 42). Cook also said Massey should not associate with Mingo Logan electrician Gary Amick because Amick “was out passing union cards around trying to get them signed” and was going to get “a lot of people in trouble” and that if Massey did associate with Amick, he “could take a chance of losing” his job (Tr. 52, 80).

Massey made notes on the back of some of Cook’s instruction sheets about what Cook told him. On the February 22, 1994 instruction sheet (Tr. 62–65; GC Exh. 5), for example, Massey wrote: “Tommy [Lowell Cook] told me to inform men their jobs on line if Union comes in. Put Say No stickers on.” On the March 29, 1994 sheet (Tr. 68–69; GC Exh. 7A), Massey wrote: “Tommy asked me how many I think sign[ed] cards for Gary Amick. [H]e would get lot of people in Big Trouble. Signing cards could lose job. Mahon would be gone for good.”

Mahon employee Dennis Hall credibly testified that in February when he and other Mahon employees were wearing union stickers on their hard hats Lowell Cook walked up and said, “Boys, I’d take them off . . . it might cause you problems and hurt your chances to get a job” with Mingo Logan (Tr. 424–425). Mahon employee Harold Bryant credibly testified that the day after he stopped wearing the union sticker, Lowell Cook told him, “I see you took your sticker off your hat.” Cook added that “there is no way with that sticker on [Bryant’s] hat” that he would get a job with Mingo Logan. (Tr. 336, 339–341.)

Mahon employee Dennis Evans credibly testified that after he signed his union card on February 6 Lowell Cook told him and Mingo Logan crew leader Johnnie Gower that if the Union goes in Mahon “would go off the hill immediately” and “it was possible that they would go to Sharkey Hollow and reset up a new portal” (Tr. 489–490). Similarly, Mingo Logan electrician Gary Amick credibly testified that around April 1 Lowell Cook told him that “before they would allow the Union to come in they would shut [the mine] down and reopen another portal around the hill and hire new employees” (Tr. 263–264, 272).

When called as a defense witness, Lowell Cook followed his pattern of testifying whatever might help his employer’s cause and denied virtually all of this credited testimony, although he did admit report seeing the union decals on three employees’ caps (Tr. 1740–1753). Having found that Cook by his demeanor on the stand appeared to be a most untrustworthy witness, I discredit his denials and find that Cook engaged in coercive conduct, violating Section 8(a)(1) of the Act, by

(a) His repeated interrogations of David Massey about his and other Mahon employees’ signing union cards.

(b) His threat to Dennis Evans that if the Union comes in, Mingo Logan would immediately remove Mahon from the mine and possibly open a new portal at Sharkey Hollow.

(c) His threat to Gary Amick that Mingo Logan would shut the mine down and reopen another portal with new employees.

(d) His informing Massey that if Mingo Logan found out who signed union cards, they would never be considered to be hired by Mingo Logan.

(e) His instructing Massey to tell the belt crew employees that their jobs would be “on the line” if the Union came in.

(f) His informing Massey that he and his crew members should put antiunion “Just Say No” stickers on their hard hats.

(g) His informing Massey that the employees should not sign union authorization cards.

(h) His informing Massey that he should not associate with a Mingo Logan employee who was passing around union cards and take a chance of losing his job.

(i) His threatening employees wearing union stickers on their hard hats with unspecified reprisals and loss of chances for permanent jobs with Mingo Logan.

General Mine Foreman Harrison Blankenship. Mahon employee Rupert Smith credibly testified that after he signed a card on February 7 Harrison Blankenship approached and said “he heard that I had signed a union card,” that “I better watch my guard,” that “the only people that would benefit [from the Union] would be the older guys there,” and that “if it went union that Ashland Oil would shut it down . . . and open up another portal—[at] Starkey or Sharkey, or whatever the name of it is.” (Tr. 550–554, 558–560, 565–568).

Blankenship, who gave much evasive and contradictory testimony about his knowledge of the organizing campaign in the mine (Tr. 1981–1984), categorically denied that “any such conversation” took place (1968–1970). I discredit the denial and find, as alleged, that he threatened mine closure, violating Section 8(a)(1).

General Construction Coordinator David Terry. Mahon employee Truman Cameron credibly testified that in March, David Terry came up and asked *whether he would work nonunion* if Mingo Logan gave him a job and then asked why he supported the Union (Tr. 513–514). As discussed later, Terry claimed that no, “I was not aware” that an organizing campaign was going on, although he later admitted he had heard about an organizing attempt and that he was wearing a “Just Say No” sticker on his hard hat (Tr. 1700, 1702). He categorically denied that the conversation occurred (Tr. 1677–1678). I discredit the denial and find, as alleged, that Terry coercively interrogated Truman Cameron, violating Section 8(a)(1).

Shift Foreman Carlos Porter, Assistant Shift Foreman Charles McDaniel, and Construction/Relief Foreman Donald Sparkman. Mahon employee Stewart Vint credibly testified that these three Mingo Logan supervisors interrogated him about the Union. Both Carlos Porter and Donald Sparkman asked him who had signed union cards and who the union leaders were. When Vint answered he did not know, each of them said that if Vint found out anything to let him know. (Tr. 176–177, 186–187, 213–215; RML Exh. 1 p. 1.) Porter’s assistant Charles McDaniel asked Vint if he knew who were involved and who were signing union cards, then warned that “if you get involved you better watch your back because it will mean your job” (Tr. 182–183; RML Exh. 1 p. 2).

Two other Mahon employees credibly testified about Sparkman’s coercive conduct. Ralph Jarrell testified that Sparkman told him that “if they find out you sign union cards you’re going to be gone” and also that “they [knew] some of the people had signed union cards, and they were in trouble” (Tr. 295–296). Glen Payne credibly testified that on March 22 just after

he handed back his union card to Mingo Logan electrician Robert Weaver, who witnessed his signature, Sparkman called him over and said “you better stay away from that guy [Weaver], he’s trouble, he’ll get you in trouble” (Tr. 595–597).

All three supervisors (Porter, McDaniel, and Sparkman) categorically denied engaging in this conduct, relying on 6 hours of TIPS training they received a year earlier in January 1993, given by Mingo Logan Trial Counsel Forrest Roles and by Mahon Trial Counsel George Oliver (then in Roles’ law firm) (Tr. 1163–1165, 1336, 1338, 1340–1341, 1347–1356, 1570, 1637–1638, 1712, 2002–2003).

Although the well-known TIPS training (no Threats, Interrogation, Promises, or Spying) is designed to assist an employer in opposing union organization by providing do’s and don’ts of the labor law, Mingo Logan’s mine superintendent, Clifton Frye, claimed, “I don’t remember if it had anything [to do] with the Company being organized” (Tr. 1572).

To the contrary, Charles McDaniel testified that it was training “about what you can and cannot talk about with employees *if there’s an organizing drive* [emphasis added]” (Tr. 1165). McDaniel claimed, however, that he was absolutely sure “there was nothing [said] about keeping the Union out” (Tr. 1176–1177), and Carlos Porter claimed “Not that I can recall” was there any discussion about how to keep the Union out (Tr. 1659). To the contrary, Sparkman admitted that Mingo Logan “wanted to remain union free” and that the TIPS training was to put you in “the best position possible” to do so (Tr. 1355).

The TIPS training was not repeated in 1994 when the union organizing campaign began. In light of the obviously coordinated conduct of these three Mingo Logan supervisors during the union organizing campaign in interrogating and threatening the employees, I infer that Mingo Logan provided the necessary signal for them—as well as Lowell Cook, Harrison Blankenship, and David Terry—to ignore the previous TIPS training, enabling it to identify the union leaders and card signers and to undercut the organizing effort.

I discredit the denials and find as alleged—in addition to the coercive conduct by Lowell Cook, Harrison Blankenship, and David Terry—that Carlos Porter, Charles McDaniel, and Donald Sparkman coercively interrogated Stewart Vint, that McDaniel implied that if Vint signed a union card he would be terminated, that Sparkman threatened Ralph Jarrell with discharge if he signed a union card, and that Sparkman threatened Glen Payne with unspecified reprisals if he associated with Robert Weaver, violating Section 8(a)(1).

2. By Mahon Supervisors Caldwell and Hawkins

Mine Foreman Larry Caldwell. In February when Mahon employees were signing union authorization cards, four of them began wearing union stickers on their hard hats. They were Harold Bryant, Truman Cameron, Dennis Hall, and Joseph Turner. Larry Caldwell saw them on the man trip one day before they entered the mine. (Tr. 227, 229.)

As Turner recalled, Caldwell told them “it could cause us to lose our jobs for wearing those stickers.” (Tr. 227, 229–230.) Bryant recalled that Caldwell said that “we shouldn’t have put those stickers on our hat,” that “Mahon didn’t have nothing to do with the Union and that it could cost all of us . . . our jobs”

(Tr. 333–334, 344). Cameron testified, “I can’t remember his exact words,” but Caldwell “told us that we shouldn’t have them stickers on our hats like that because it could jeopardize” our jobs (Tr. 512–513). They appeared to be giving their best recollections of what happened.

Caldwell admitted expressing his opinion that the stickers were inappropriate because the battle was between Mingo Logan and the Union, but categorically denied that he told them “they could lose their jobs wearing those stickers.” I discredit his denial and find that Caldwell’s threat that the union stickers could cost them their jobs was coercive and violated 8(a)(1).

Mahon employee Ralph Jarrell credibly testified that Caldwell told him and another employee that they had union stickers on their cars and that “we have to remove those stickers” and “if we was in any union activities . . . we could be gone” (Tr. 288–289, 306). Caldwell categorically denied that such a conversation occurred (Tr. 2220–2221). Regarding his credibility, Caldwell first claimed, “I don’t know” whether the “Just Say No” sticker on his hard hat meant to just say no to the Union. He later testified that he assumed it did, but claimed that he had it on his hat because “It was a pretty sticker.” (Tr. 2225–2227.) I discredit his denials of the conversation and find as alleged that he told employees to remove union stickers from their vehicles and threatened them with discharge if they engaged in union activity, violating Section 8(a)(1).

Shift Foreman James Hawkins. Mahon employee James Osborne credibly testified that before he signed a union card on February 16, James Hawkins told him “whoever signed a card would be gone” (Tr. 526, 533–534). I discredit Hawkins’ categorical denial and find that the threat that Osborne would be discharged if he signed a union card was coercive and violated Section 8(a)(1).

Mahon employee Michael Dillon credibly testified that about 3 or 4 days before his April 10 layoff, Hawkins asked him “if I had signed one of the cards.” Dillon admitted he had. (Tr. 383, 388–389, 393.) Hawkins categorically denied that this conversation ever took place (Tr. 2169, 2173–2174). I discredit the denial and find that in the context of Dillon’s summary layoff on April 10, the interrogation tended to be coercive and violated Section 8(a)(1).

3. By Mahon Supervisor Danny Colegrove

a. Motivation for April 10 layoffs revealed

Danny Colegrove—whom both Mingo Logan and Mahon admitted in their February 1995 answers was an “Assistant Foreman,” as discussed below—was also a fireboss during the union organizing campaign before the April 10, 1994 layoffs.

Mahon employee Stewart Vint stated in his April 28, 1994 pretrial affidavit, which Mingo Logan—joined by Mahon—introduced as an Mingo Logan exhibit (RML Exh. 1 p. 2, pars. 3 & 4; Tr. 213, 215):

Danny Colegrove works for Mahon. He firebosses for Mingo Logan and signs the books and also act[s] as a foreman of [the Mahon employees] a lot. He is the guy they send out to gather information on employees. He go[es] all over listening to what was going on and then report[s] back.

Sometime in March, I had a conversation with Colegrove about the Union. . . . When Danny goes and tells the company what's going on, he gets information to take back to us. *As an acting foreman and fireboss he spends a lot of time in the office with the supervisors.* [Emphasis added.]

Based on what occurred in the Mahon office, Colegrove revealed to two employees, Stewart Vint and Glen Payne, information regarding the motivation for the April 10 layoffs.

Stewart Vint credibly testified about a conversation that began with Danny Colegrove asking him, "did I feel like that there was a real threat of the Union coming in." (As Vint remembered when giving his affidavit on April 28, 1994, this conversation was sometime in March, not in February.) Then (Tr. 183–185):

Danny said, well . . . I came back from a *meeting with Amon Mahon* and he said we're going to *take 20 guys or so* and we're going to *lay them off, or fire them, and make them an example* to everybody else. He said those guys that [have] the stickers on their hats on the day shift they're *definitely gone*."

....

Q. Do you recall whether he said how they were going to select the 20 guys?

A. Well, he told me that it . . . would be the 20 guys that were the *oldest men there that was involved in the union activity.* [Emphasis added.]

Vint further recalled when giving his affidavit that Colegrove also said the employees would be laid off "just as soon as we find out who has signed those cards" (RML Exh. 1 p. 2, par. 4).

Glen Payne credibly testified that "between two days and a week before I got laid off, *in the presence of Jim Auxier (a Mahon foreman who did not testify)*, Colegrove came up on his motor and told Payne (Tr. 600–603; GC Exh. 37):

He said, "well, we're going over the names and there's *going to be a layoff*" and I said "who's going over the names," and he said, "*Dave Terry* [Mingo Logan's general construction coordinator] is coming down to the Mahon Office and him and Lynn [Lenville Mahon] are *going over the names, list, page by page,*" and he said, "*I think I've got them straightened out for you,* but you better watch who you're talking to." [Emphasis added.]

Colegrove testified that he did not recall asking Vint if he thought there was a real threat of the Union coming in, but otherwise categorically denied both of these conversations (Tr. 2279–2280, 2283–2284). I discredit his denials. While testifying, he appeared eager to fabricate any testimony that would help his employer's cause.

I find that Colegrove's statements to Stewart Vint that Amon Mahon was threatening the layoff of 20 or so of the oldest employees involved in union activity as an example to the other employees and threatening that employees wearing union stickers on their hats "were definitely gone," as well as Colegrove's interrogation of Vint in this context, were coercive and violated Section 8(a)(1).

I also find that Colegrove's statement to Glen Payne that Mingo Logan's coordinator, David Terry, and Lenville Mahon were going over a list of names of Mahon employees for a layoff—particularly in the context of his statement, "I think I've got them straightened out for you" (referring to his belief that Payne had not signed a union card)—and Colegrove's warning that "you better watch who you're talking to" (referring to union supporters), were a coercive threat and warning and violated Section 8(a)(1).

b. Colegrove's other interrogations and threats

About a week after Colegrove revealed Amon Mahon's threats, as Stewart Vint credibly testified, Colegrove "asked me had I signed a card." When Vint told him no, Colegrove "opened up my lunch bucket." Vint asked him what he was doing, and Colegrove answered, "I'm looking to see if you have any union cards." (Tr. 185–186.) Vint first recalled at the trial that this happened in February, but after reviewing his April 28 affidavit, he credibly testified that his recollection was refreshed and "it was in March." (Tr. 207–209, 213–214.)

Mahon employee Ralph Jarrell credibly testified that after he signed a union card he commented to Colegrove that "it looks like it's going to get a little rough." Colegrove responded that "well, anybody that has signed a union card . . . is going to be in trouble." Colegrove added, "I like you Ralph" and "I'd like to see you stay here. You're a good worker," but "if you sign a union card [be aware that] there is going to be a bunch leave here." (Tr. 296–297.)

Mahon employee Albert Bonds credibly testified, "I can recall Danny Colegrove talking in the bath house and telling some younger guys, and just in general to everybody that if you signed a union card you was crazy, and you probably would get your hind end in trouble then if they found out" (Tr. 313).

Mahon employee Dennis Hall credibly testified that less than a week before he was laid off (on April 10) Colegrove "just asked me did I sign" a union card. Hall answered, "Yes, I did, Danny," because he had known Colegrove since they grew up together, "and the next thing I know we was all laid off." Hall "figured [Colegrove] was just going around trying to see who had signed" a union card. (Tr. 422.)

Colegrove either claimed he did not remember (if asked) or categorically denied these interrogations and threats (Tr. 2281, 2284–2287). I discredit his denials. I find that his interrogation of Stewart Vint and his looking into Vint's lunch bucket for union cards, his statements to Ralph Jarrell that anybody who signed a union card is going to be in trouble and "there is going to be a bunch leave here" (for signing union cards), his statement to Mahon employees in the bath house and overheard by Albert Bonds that anybody signing a union was crazy and probably would get their hind end in trouble if found out, and his interrogation of Dennis Hall about signing a union card were coercive and violated Section 8(a)(1).

c. Shifting positions on supervisory status

On the second and fourth days of the trial (January 22 and 24, 1997), Mahon employees Stewart Vint and Glen Payne gave the credited testimony that would tend to belie Mingo Logan's defense that the April 10 layoff of 18 Mahon employ-

ees was not “designed to thwart the [Union’s] organizing campaign.”

As found, Colegrove revealed to Vint that Amon Mahon said 20 or so of the oldest Mahon employees involved in the union activity were going to be laid off to make an example to everybody else and those wearing union stickers on their hats were “definitely gone.” He later revealed to Payne a few days before the layoffs that Mingo Logan’s coordinator, David Terry, and Lenville Mahon were in the Mahon office, “going over the names, list [of Mahon employees], page by page” for a layoff and indicated to Payne that Mingo Logan and Mahon were selecting employees based on their union support by saying: “I think I’ve got them straightened out for you [referring to Colegrove’s belief that Payne had not signed a union card], but you better watch who you’re talking to [referring to union supporters].”

Evidently realizing the possible impact of this testimony on their defenses, both Mingo Logan and Mahon (by Trial Counsel Forrest Roles and George Oliver) prepared amended answers (after the 1-month adjournment of the trial on January 24) to shift their positions and deny that Colegrove was a supervisor at material times.

Mingo Logan falsely represents in its brief (at 56), signed by Counsel Roles, that its “answer had consistently denied [Colegrove’s] supervisory status.”

To the contrary, Mingo Logan’s first answer (GC Exh. 1p) admitted paragraph 7 of the February 10, 1995 consolidated complaint (GC Exh. 1m), which alleged that “Assistant Foreman” Danny Colegrove was a Section 2(11) supervisor of the Respondents at “all material times.” This February 22, 1995 answer was signed by Larry Rothman, an attorney in Roles’ law firm, Smith, Helms & Althen. Mahon’s February 21, 1995 answer (GC Exh. 10), filed by Attorney Shawn George, also admitted Colegrove’s “Assistant Foreman” position.

That February 10, 1995 complaint (GC Exh. 1m) alleged in paragraph 8(f) that about “late March or early April 1994,” Colegrove “Interrogated employees about their union activities” and “Threatened that Respondents would lay off about 20 employees as a result of their sympathies and activities.” His supervisory status was relevant to those alleged violations.

The August 21, 1996 amended complaint (GC Exh. 1LL)—issued after the Board’s August 13, 1996 Order finding that Mingo Logan and Mahon were joint employers (GC Exh. 1vv)—again alleged that Mahon’s “Assistant Foreman” Colegrove was a statutory supervisor of the Respondents. Mingo Logan’s September 5, 1996 answer (GC Exh. 1nn), signed by Roles, denied that Colegrove was a Mingo Logan supervisor and denied Colegrove’s alleged interrogation and threat, but did not specifically deny that Colegrove was a Mahon supervisor.

The January 28, 1997 second amended complaint (Tr. 387; GC Exh. 1zz) again alleged Mahon’s “Assistant Foreman” Colegrove was a supervisor. This time, in its February 3, 1997 prepared answer (GC Exh. 1aaa), signed by Roles, Mingo Logan *shifted its previous position* taken in February 1995. Mingo Logan specifically denied that “Danny Colegrove was employed as an assistant shift foreman for Mahon Enterprises at the material times.” Mahon’s February 5, 1997 prepared answer (GC Exh. 1bbb), signed by Oliver (now with another

law firm, Smith, Helms, Mulliss & Moore), made an identical denial.

At the resumed trial on February 24, 1997, there was no contention that Mingo Logan’s February 22, 1995 answer (signed by Rothman), admitting Colegrove’s supervisory status, was filed without Mingo Logan’s knowledge and consent. Instead, Roles represented (Tr. 679), “We did not know what [Colegrove’s] status was . . . in the matter alleged here” when “we stipulated that he was a supervisor” at the June 1994 hearing in the representation case (GC Exh. 31, Board Exh. 3, R; Tr. 4, 17, 191).

Roles further represented (Tr. 679) that he personally “learned from Mr. Oliver during the hearing of this case [in the first week of trial on January 21–24, 1997] what the circumstances were as to [Colegrove’s] position.” This was apparently when Mahon shifted its position on Colegrove’s status after employees Vint and Payne testified.

I find that regardless of Roles’ personal knowledge of Colegrove’s supervisory status,

Mingo Logan did admit in its first answer (contrary to its brief signed by Roles) that Colegrove was a supervisor at “all material times.”

Oliver does not contend that Mahon’s February 21, 1995 answer (signed by Shawn George), admitting Colegrove’s “Assistant Foreman” position, was filed without Mahon’s knowledge and consent. Instead, Oliver represented (Tr. 658) that Shawn George “is not a labor lawyer . . . not understanding and realizing the scope of supervisory status.”

This contention is not persuasive. The February 10, 1995 complaint alleged that “About late March or early April 1994,” Mahon “by Danny Colegrove,” an “Assistant Foreman” and Section 2(11) supervisor, unlawfully interrogated employees and threatened to lay off 20 of them. Mahon, which employed Colegrove, was of course aware of his status at the alleged time. If Colegrove had not been acting on its behalf as a supervisor, Mahon undoubtedly would have denied his supervisory status, instead of admitting in its February 21, 1995 answer in this proceeding that as alleged, Colegrove was an “Assistant Foreman.”

Mingo Logan and Mahon were not permitted to belatedly amend their answers under these circumstances (Tr. 676, 686–687). As it requested, however, Mahon was permitted (supplementing an earlier narrative offer of proof, Tr. 2090–2091) to make an offer of proof by questions and answers for a full record of its position on Colegrove’s supervisory status in 1994 before the April 10 layoffs (Tr. 2253–2254). Colegrove then testified at length regarding his status, on both direct and cross-examination, giving me the opportunity to further observe his demeanor on the stand and evaluate his credibility (Tr. 2255–2273).

d. Colegrove’s conflicting testimony

(1) His first version

In the representation case hearing, at which Mingo Logan and the other parties stipulated that Danny Colegrove was the “2nd Shift Assistant Foreman” (GC Exh. 39, Board Exh. 3, R-Tr. 191), Colegrove testified on June 9, 1994, that he was then

a fireboss and “fill-in mine foreman” on the evening shift (R-Tr. 639, 641).

When questioned by the hearing officer about the term, “assistant mine foreman,” Colegrove testified that he held that job on the evening shift 2 days a week, reporting to Mahon Foreman James Hawkins or Larry Caldwell (R-Tr. 649–650). He also testified that an assistant foreman would fill in for the foreman in the foreman’s absence, or the foreman and assistant foreman might work on different jobs, but that there is no difference in “what they’re doing with the men” (R-Tr. 650–651).

Earlier when asked on direct examination if he has worked on the evening shift at sometime in his 3 years working for Mahon at the mine, he answered yes, that he has been a crew leader and a mine foreman. He further testified (R-Tr. 641):

Q. And approximately how long did you work on the evening shift as a *crew leader and a mine foreman*?

A. I’d have to go back and take a look at that. I’d say it *may be 6–8 months*, something like that. [Emphasis added.]

Colegrove then testified that “in that capacity,” he worked as crew leader on part of the longwall. He testified that he “made the decisions [on] how that work specifically would be done,” and “during the time that [he was] foreman or crew chief,” he did not know of any Mingo Logan supervisors instructing the Mahon employees. He described what “the Mahon employees did under [his] *supervision* [emphasis added],” both on longwall maintenance *and on longwall setup*, and testified that he was paid at a higher rate than the other Mahon employees because “I was the boss.” (R-Tr. 641–648.)

(2) Intervening admissions and evidence

Before Colegrove next testified nearly 3 years later on March 6, 1997, the last day of the trial, there had been repeated admissions regarding his supervisory status before the April 10, 1994 layoffs and also evidence that he was recognized as a Mahon supervisor both by Mingo Logan and by Mahon employees.

As found, the February 10, 1995 complaint in this proceeding had alleged that “Assistant Foreman” Danny Colegrove was a Section 2(11) supervisor at “all material times.” In their answers both Mingo Logan and Mahon admitted that he was an “Assistant Foreman” and Mingo Logan admitted the entire allegation, that Colegrove was a statutory supervisor at “all material times.”

Also on February 24, 1997, when Mahon was arguing that it was entitled to change its position and deny that “Danny Colegrove was employed as an assistant shift foreman for Mahon Enterprises at the material time” (in 1994 before the April 10 layoffs), it admitted that Colegrove had been a supervisor for 6 or 8 months.

Speaking through Trial Counsel George Oliver (who “came into [this] case very late,” not “until about the end of December [1993],” Tr. 667), Mahon contended that when Colegrove testified in June 1994, that he had been a crew leader and mine foreman maybe 6 or 8 months on the evening shift, that did not mean 6 or 8 months immediately before June 1994. It contended that Colegrove’s testimony “simply goes to his status while he was employed for Mahon over a 3-year period” while

he was on the evening shift and therefore, Colegrove had not admitted that he had been a crew leader and mine foreman from January to April 10, 1994, when he was on the owl shift. (Tr. 681–686.)

Thus, Mahon was acknowledging that Colegrove had admitted being a “crew leader and mine foreman” on the evening shift in the 3-year period before 1994.

Three days later at the trial, on February 27, 1997, a Mingo Logan supervisor gave obviously damaging testimony to Mingo Logan’s and Mahon’s defense, although ignored in both of their briefs. Construction/Relief Foreman Donald Sparkman (upon questioning by Oliver) admitted that Colegrove was one of four Mahon foremen that he recalled were foremen since Sparkman became a foreman in 1992 “up to January ’94” and that he recalled Colegrove being one of three Mahon supervisors (along with Mine Foreman Larry Caldwell and Shift Foreman James Hawkins) “that were employed by Mahon from January of ’94 through April of ’94” (Tr. 1343–1344).

This testimony tends to corroborate the evidence of Mahon employee Stewart Vint in his April 28, 1994 pretrial affidavit, which Mingo Logan—joined by Mahon—introduced as a Mingo Logan exhibit (RML Exh. 1 p. 2, pars. 3–4; Tr. 213, 215). Referring to Colegrove’s status in the first quarter of 1994, when Colegrove was working on the owl shift, Vint stated in the affidavit that Colegrove “firebosses for Mingo Logan,” acts “as a foreman of [the Mahon employees] a lot,” and “As an acting foreman and fireboss he spends a lot of time in the office with the supervisors.”

When asked on cross-examination (by Oliver) about the statement in his affidavit that Colegrove “firebosses,” Vint credibly testified that he did not know that particular night that Colegrove was going to fireboss, because he firebossed “at certain times” and “he didn’t” at other times (Tr. 204).

Sparkman’s testimony also tends to corroborate Mahon employee Ralph Jarrell’s credited testimony that “the last of February, first of March” (1994), when Colegrove told him that “anybody that has signed a union card . . . is going to be in trouble,” Colegrove was a foreman (Tr. 296–297). On cross-examination by Oliver, Jarrell credibly testified that he knew Colegrove was a foreman because “he had told us he was a foreman,” although Jarrell could not remember when (Tr. 308–309).

Thus, when Colegrove was called to testify on March 6, 1997, the last day of the trial, there was evidence (a) that Mingo Logan recognized him as a foreman both before and after January 1994, (b) that Mahon employees recognized him as a foreman after January 1994, and (c) that Mahon had acknowledged at the trial on February 24, 1997, that Colegrove admitted in his testimony in the representation case that he had been a “crew leader and mine foreman” on the evening shift maybe 6 or 8 months in the 3-year period before January 1994.

Meanwhile on March 5, the day before Colegrove testified, Mahon made a narrative offer of proof that Amon Mahon would testify that between January 1 and April 10, 1994, Colegrove was a fireboss and was not a supervisor (Tr. 2090–2091).

(3) Colegrove's fabricated version

As found, Colegrove testified in 1994 in the representation case that in his 3 years working for Mahon at the mine, he had been a "crew leader and mine foreman" on the evening shift for maybe 6 or 8 months, with Mahon employees working under his supervision. Yet, on March 6, 1997, he categorically denied on direct examination that before the end of 1993 he had ever served "in any capacity as a supervisor for Mahon" (Tr. 2252).

When questioned about his previous testimony, he testified that the 6 or 8 months was "on the second shift doing maintenance at one time on the longwall, that was the down shift once" (Tr. 2261). He next claimed that when he testified in 1994, he meant that he had served as a crew leader on the longwall "around 6 months, something like that," and that he had been a mine foreman "not longer than that 2 months," starting on April 11 (Tr. 2262).

When asked if his previous testimony was wrong that he had been working as a crew leader and mine foreman for 6 to 8 months, he answered: "No, sir. What I meant by that was while I was on the longwall there on second shift, yes, I was a crew leader," and "No, sir," he was not denying "and a mine foreman." (Tr. 2262–2263).

Colegrove then contradicted this admission and returned to his original testimony on direct examination. When asked if he had been a crew leader and mine foreman for 6 or 8 weeks when he testified on June 9, 1994, he answered, "Yes, sir," but added, "Not both at the same time though. When I was a crew leader on longwall, I wasn't a mine foreman, but up to the time that I testified there, from April up to June, I was filling in as a foreman." (Tr. 2263–2264.) He appeared determined to support the Company's position.

He also testified that he left the longwall about May or June 1993 when "everybody came off the longwall from Mahon," and never performed "any other maintenance type work on the longwall after that." Then, contrary to his June 1994 testimony that he was crew leader also over longwall setup (the work Dennis Evans was assigned after being taken off the longwall maintenance work, Tr. 832–837). Colegrove claimed that after leaving longwall maintenance around May or June 1993, he started firebossing until the end of 1993 (Tr. 2251).

He claimed that he worked between January and April 10, 1994, on the owl shift only as a fireboss, with no supervisory responsibilities. He also claimed that on April 11, 1994, when he rotated to the evening shift, he first filled in as a foreman 2 days a week—on the weekends, in the absence of "the boss," or on his days off. (Tr. 2255, 2258.)

e. Concluding findings on supervisory status

Thus, contrary to the admissions and the credited evidence, Mahon produced testimony by Colegrove at the trial that Colegrove had never served as a Mahon supervisor before the end of 1993 and that from May or June 1993, until he testified in the representation case in June 1994, he never filled in as a foreman until April 11, 1994, the day after the layoffs.

As indicated, Colegrove appeared on the stand to be eager to fabricate any testimony that would help his employer's cause. I discredit this testimony.

After weighing all the evidence, including Colegrove's conflicting testimony, I find as first admitted by Mingo Logan in this proceeding that at "all material times" (from January until April 10, 1994) Danny Colegrove was a statutory supervisor. I reject the contrary contention of Amon Mahon, who gave much discredit testimony in this proceeding.

*D. Mingo Logan's Role in April 10 Layoffs**1. Reduced Mingo Logan working hours*

As found, Mahon was providing Mingo Logan as contract labor many skilled, experienced union miners at a saving of about \$6 an hour in labor costs. The Mahon employees were performing a large amount of outby (nonproduction construction and support) work, much of which would be necessary for the life of this mine as well as the life of another mine on a lower level—even though Amon Mahon claimed they were doing "temporary" work, which he defined as "anything less than permanent" (Tr. 2108).

While utilizing the services of these contract employees, Mingo Logan was expanding its own work force of nonunion employees. It hired a large number of the Mahon employees after screening them on the job. Besides the four Mahon supervisors it hired in 1992 (Jim Allen, David Terry, Charles McDaniel, and Henry Shaffer), Mingo Logan hired a total of 41 Mahon employees from April 16, 1992, until February 22, 1994, when it hired employee Richard Curry during the organizing campaign. (Tr. 1455–1456; GC Exh. 34 pp. 1–3.)

As illustrated by Coordinator David Terry's interrogation of employee Truman Cameron in March, Mingo Logan was seeking nonunion employees. As found, Terry asked Cameron *whether he would work nonunion* if Mingo Logan gave him a job.

Meanwhile, Mahon had a large turnover of employees working for its lower wages and benefits. As Amon Mahon admitted, Mingo Logan continually urged him "always to try to hang onto as many people and . . . to add as many people as possible." Mahon continued adding new employees to its work force, 80 percent or more of whom were union miners. (Tr. 548, 1076, 2055, 2112.)

In October 1993, with its own work force expanded and with a continuing large number of Mahon employees working in the mine, Mingo Logan decided to reduce the overtime. It reduced the scheduled hours of all its underground employees from 10 to 9 hours a day. This left more outby construction and support work for the lower paid Mahon employees to perform. (Tr. 1482–1483.)

It also meant that some of the Mingo Logan employees would have a short workweek much of the time. The longwall employees, working 5 days on and 3 days off, worked either 4 or 5 days a week depending upon how their scheduled workweek fell in the calendar week. When Mingo Logan cut their workday from 10 to 9 hours, they were working a 36-hour workweek (four 9-hour days) about half the time. (Tr. 706–708.)

Some of the longwall employees complained, but their scheduled 9-hour workdays continued for 6 months until April, after Mingo Logan had decided on the layoff of Mahon em-

ployees during the Union's organizing campaign (Tr. 1884–1885).

2. Plans for layoffs and increased working hours

On March 24–25, in the third month of the organizing campaign—when only about a fifth of the mine had been developed (Tr. 1999)—Mingo Logan prepared a proposed budget to schedule more working hours and cover the increased labor costs of an all Mingo Logan work force after phasing out the Mahon contract employees.

The proposed budget, to be implemented on April 1, provided for an annual *net increase* of 13,228 scheduled hours, to be accomplished by (a) increasing the working hours of 140 of the 258 mine employees, with a total increase of 36,344 hours a year, (b) adding 4 inby jobs, and (c) initially eliminating 17 outby jobs being performed by Mahon employees. Administrative Director James Mooney calculated that the budgeted changes would increase the annual labor costs by \$375,402. (Tr. 1859–1862, 1895–1896; GC Exhs. 42, A–C.)

The proposal would increase the scheduled hours in two ways. First, it would change the schedule of most of the employees shown to be working 5 days on and 3 days off, to work 5 days on and 2 days off. Second, it would lengthen the 9-hour workday of the longwall and longwall support employees remaining on the 5–3 schedule to 10 hours a day, admittedly giving them more overlap hours each day to perform “a lot more of their own [outby] construction work” (Tr. 1993–1995).

The spreadsheet that Mooney prepared on March 25 (in a meeting with Mine Superintendent Frye) shows that the proposed budget was based solely on Mingo Logan's hours, wages, and fringe benefits. The proposal (excluding four outside employees) provided—after eliminating 17 outby jobs and adding 4 inby jobs—for a net reduction of 13 employees. This would be a reduction from a total of 258 underground employees to a total of 245. (Tr. 1588, 1594–1595, 1599; GC Exhs. 42, C.)

Regarding the \$19 inby employees on the worksheet (Tr. 1587), the “Today” column (GC Exh. 42, exh. C, LL. 1 & 3) shows 52 present 5–3 employees (working 5 days on and 3 days off) and 70 present 5–2 employees (working 5 days on and 2 days off). The “Proposal” column (line 1) shows a reduction in the number of 5–3 inby employees from 52 to 40 (the number of longwall employees remaining on the 5–3 schedule, Tr. 1864–1865)—a *reduction* of 12. It (L. 3) shows an increase in the number of 5–2 inby employees from 70 to 86, an *increase* of 16. The 16 figure includes the 12 employees removed from the 5–3 schedule, plus four additional inby employees. (Tr. 1587–1588.)

Thus, 12 of the present 52 inby 5–3 employees would be working on the 5–2 schedule, along with 4 other inby employees.

Regarding the \$18 outby employees on the spreadsheet, the “Today” column (LL. 2 & 4) shows 105 of them as present 5–3 employees and 31 as present 5–2 employees. The “Proposal” column (L. 2) shows a reduction in the number of 5–3 outby employees from 105 to 14 (the number of longwall support employees remaining on the 5–3 schedule, Tr. 1864–1865, 1978)—a *reduction* of 91. It (L. 4) shows an increase in the

number of 5–2 outby employees from 31 to 105, an *increase* of 74 (17 fewer outby employees than the 91 shown to be removed from the 5–3 schedule).

Thus, after the layoff of Mahon employees, 74 outby employees shown to be removed from the 5–3 schedule would be working on the 5–2 schedule.

The spreadsheet further shows the proposed annual increase in scheduled hours.

The “Proposed” column (LL. 1 and 2) shows 54 longwall and longwall support employees (40 inby and 14 outby employees) remaining on the 5–3 schedule and working 10 hours a day. The “Today” and “Proposed” columns (LL. 8 and 9) show that this is a scheduled increase for each of the 54 employees of 208 hours a year, from 1868 to 2076 hours. The “Today” and “Proposed” columns (LL. 1–4 and 8–11) also show that the scheduled hours of each of the 86 employees (12 inby and 74 outby employees), removed from the 5–3 schedule and added to the 5–2 schedule (and still working 9 hours a day), would be increased 292 hours a year from 1868 to 2160 hours.

James Mooney confirms (Tr. 1867) that increasing the hours of employees on the 5–3 schedule from 9 to 10 hours a day would raise their scheduled hours to 2076 hours a year (from 1868 hours, an increase of 208 hours), whereas keeping their hours at 9 hours a day and putting them on the 5–2 schedule would raise their scheduled hours to 2160 hours a year (an increase of 292 hours).

Thus, each of the 54 (40 inby and 14 outby) longwall and longwall support employees remaining on the 5–3 schedule and working 10 hours a day would be scheduled an increase of 208 hours a year—a total increase of 11,232 hours a year for the 54 employees. Each of 86 (12 inby and 74 outby) other employees shown to be removed from the 5–3 schedule and working 9 hours a day on the 5–2 schedule would be scheduled an increase of 292 hours a year—a total increase of 25,112 hours a year for the 86 other employees (over twice the total increase of 11,232 hours for the longwall employees).

The proposed budget therefore provided for a total annual increase of 36,344 (11,232 plus 25,112) in the number of scheduled hours for 140 (54 longwall and 86 other) employees.

Column 5 of the spreadsheet (L. 6) shows that after the layoff of 17 Mahon outby employees and the addition of 4 inby employees, the net increase in the number of scheduled annual hours in the proposed budget was 13,228 hours. The “Proposal” column (L. 21) shows that the increased annual costs of these changes, because of Mingo Logan's higher wages and its employee fringe benefits, would be \$375,402 (Tr. 1590–1591, 1877).

I note that the 105 outby employees shown to be 5–3 employees in the “Today” column (L. 2) includes Mahon outby employees who were not in fact working on the 5–3 schedule. The purpose of the worksheet, however, was to alert Mingo Logan to the increased labor costs of over a third of a million dollars when it fully implemented the proposed changes, going to an all Mingo Logan work force after phasing out the Mahon contract labor.

James Mooney submitted the proposed budget to Mingo Logan President Marcus Ladd and Mine Manager James Mullins for approval (Tr. 1885). Mingo Logan admitted in its June

6, 1994 statement of position (GC Exh. 42 p. 6, par. 1) that it “intended to implement these changes at the beginning of the new calendar quarter on April 1” and the “changes were completed” on April 10.

3. Layoffs during union organizing campaign

As planned, the proposed 10-hour workday for the longwall and longwall support employees was implemented the first week in April (Tr. 1314). The layoff of Mahon employees, however, was delayed until April 10, evidently because nine of the employees to be laid off were working an average of 63 hours (22 to 24 hours of overtime) during the week ending April 3. They were four employees classified as laborers (Thomas Bailey, John Eanes, Rupert Smith, and Joseph Turner), four operators (Harold Bryant, Truman Cameron, Michael Dillon, and Dennis Evans), and a crew leader (David Massey). In addition, five other employees to be laid off worked from 13 to 15 hours of overtime that week (general laborer Jerry Tawney and operators Dennis Hall, Buddy Maynor, James Osborne, and Glen Payne). (GC Exh. 38.)

About 5:30 p.m. on Saturday, April 9, Mingo Logan Coordinator David Terry notified Amon Mahon that Mahon’s complement of 91 outby employees (GC Exh. 38; Tr. 1138) must be reduced by 18 to 73 employees (Tr. 1686).

The 18 employees—from the list of Mahon employees that David Terry and Lenville Mahon went over in the Mahon office a few days before—included the layoff of 14 skilled operators (11 of whom were classified as operators and 3 of whom, including Joseph Turner, were classified as general laborers) and David Massey, whom Mingo Logan had selected to be belt crew leader but who was then wearing a union sticker on his hard hat (Tr. 39, 221–222, 867–868, 949–950, 1019–1020, 1061, 1094–1095; Mahon Br. 17).

On Sunday, April 10, Amon Mahon telephoned and summarily laid off the 18 employees (Tr. 1062). He told David Massey “it wasn’t his doings, he didn’t [have] a say-so” in laying Massey off (Tr. 58–59). It is undisputed that about April 20 when a group of the laid-off employees on their last payday met with Amon Mahon he told David Massey and Stewart Vint they were two of the best workers and “it wasn’t his choice” that this happened (Tr. 59–60).

A total of 17 of the laid-off employees had signed union authorization cards, as found. They were Thomas Bailey, Harold Bryant, Truman Cameron, Jerry Canterbury, Michael Dillon, John Eanes, Dennis Evans, Dennis Hall, Ralph Jarrell, David Massey, Buddy Maynor, James Osborne, Glen Payne, Rupert Smith, Jerry Tawney, Joseph Turner, and Stewart Vint. The 18th employee, Carl Workman, was a nonunion general laborer.

The summary layoffs of the 17 card signers effectively ending the Union’s organizing campaign in the mine. When asked “how many cards did the Union get signed after these individuals were laid off,” International Representative Bernard Evans (who was leading the organizing drive) credibly answered, “Not a one. That stopped the drive completely.” In his opinion, “It scared everybody to death.” (Tr. 622.) As found, the Union filed an election petition on April 28, 1994, but later withdrew it.

4. Mingo Logan’s defenses

a. The new budget

Mingo Logan initially relied on the new budget as a defense in its June 6, 1994 statement of position, submitted by Attorney Larry Rothman in Counsel Roles’ law firm, Smith, Heenan, & Althen, representing Mingo Logan (GC Exh. 42 pp. 4–6). Mine Superintendent Frye testified on cross-examination that before this statement of position was prepared, he discussed the issues with the Mingo Logan attorneys (Tr. 1576, 1596–1597).

The statement of position ignored both the adding of four inby employees and Mooney’s March 25 calculation that the budget provided for an annual increase of \$375,402 in labor costs.

At the trial Frye was prepared to claim various defenses for the April 10 layoffs (permit problem, 10-hour workday, completion of longwall move, and change in rock work, discussed below), without making any reference to the new budget (Tr. 1532). Although he and Mine Manager James Mullins provided Mooney with the figures to use in calculating the increase in hours and the \$375,402 additional labor costs in the budget (Tr. 1895–1896), Frye claimed on cross-examination, “I remember—now that you’ve brought this up I remember discussions with this document.” He explained, “I’d about *forgotten about it* [emphasis added], but now that you’ve brought it up I remember this.” (Tr. 1580.)

On further cross-examination Frye admitted that he discussed the “specific numbers” of Mahon personnel in the proposed budget with Mullins and the impact of 10-hour longwall shifts in his meeting with Mooney, who prepared the March 25 spreadsheet (Tr. 1599).

Now in its brief, Mingo Logan completely ignores the new budget, which tends to contradict the contention in its brief (Br. at 78) that “the undisputed evidence is that the sole motivation for the reduction was economic.”

The new budget reveals a reversal of Mingo Logan’s policy of urging Amon Mahon to furnish as many outby employees as possible. The budget shows that Mingo Logan intended to phase out the Mahon employees and go to an all Mingo Logan work force, even though this would increase its annual labor costs by over a third of a million dollars.

Thus instead of supporting the Company’s contention that the “sole motivation” of the layoff of the Mahon employees “was economic,” the new budget indicates that Mingo Logan was willing to increase its annual labor costs by over a third of a million dollars for the remaining life of this mine—besides the increased labor costs during the life of another mine on a lower level—to undercut the organizing drive and keep out the Union.

b. Other defenses

Mingo Logan has offers a number of other defenses, all of which I find lacking in merit.

Joint Employers. Mingo Logan contends in its brief (Br. at 3, 24, 31, 42) that it and Mahon are not joint employers and therefore it is not responsible for Mahon’s layoff of the 18 outby employees on April 10.

As part of its support of that defense, Mingo Logan presented testimony that Mahon crew leader David Massey was a

Mahon foreman and that Belt Foreman Lowell Cook's instructions to him were therefore to a Mahon supervisor and did not constitute codetermination of supervision of Mahon employees. As found, the testimony that Massey was a supervisor is fabricated. There is much credited evidence showing that Mingo Logan and Mahon were joint employers of the Mahon employees, as found.

Selection of Employees for Layoff. Another defense is that Danny Colegrove (who revealed to an employee information indicating that Mingo Logan Coordinator David Terry was participating in selecting Mahon employees for a layoff on the basis of their union support) was *not* a supervisor. As found, Mingo Logan falsely represents in its brief (Br. at 56), signed by Counsel Roles, that its "answer had consistently denied [Colegrove's] supervisory status." To the contrary, its answer in this proceeding on February 22, 1995 (GC Exh. 1p) admitted that Colegrove was an assistant foreman and a Section 2(11) supervisor at "all material times."

Having weighed all the evidence, including Colegrove's conflicting testimony in the representation case and at the trial, and having observed his demeanor on the stand, where he appeared "eager to fabricate any testimony that would help his employer's cause," I have discredited his denials and found that he was a statutory supervisor at all material times.

I discredit David Terry's denial that he and Lenville Mahon "had a discussion about which specific Mahon employees would be laid off" (Tr. 1699-1700) and his claim, "I had no idea who the laid-off employees would be" (Tr. 1717). By his demeanor on the stand, Terry appeared equally as untrustworthy a witness as Colegrove.

Terry went so far in trying to help his employer's cause as to positively testify (Tr. 1700), "No, sir, I was not aware" that there was "an organizing campaign going [on] by the United Mine Workers at the mine site during the first quarter of 1994." He later testified (Tr. 1701-1702) that "I had heard" there was an organizing attempt and admitted that he was wearing a "Just Say No" sticker on his hard hat. As found, he asked Truman Cameron during the organizing drive whether he would work nonunion if Mingo Logan gave him a job and, in the same conversation, asked Cameron why he supported the Union.

Lenville Mahon not only denied that he ever went "over a list of employees that were going to be laid off with any Mingo Logan supervisor," but claimed that he was not aware of the layoff of employees until after it occurred (Tr. 2140-2141). I discredit this testimony. He appeared less than candid on the stand.

Other evidence contradicting Mingo Logan's contention in its brief (Br. at 65) that it "played no part in the selection of employees for layoff" is discussed later.

Interrogations and Threats. Another defense in Mingo Logan's brief (Br. at 33) is to the allegations that it unlawfully coerced the employees through its supervisors' interrogations and threats. It contends that none of this occurred. To the contrary, there is overwhelming credited testimony that Mingo Logan, through its supervisors, carried on an extensive anti-union campaign, interrogating Mahon employees to identify the union leaders and card signers and making threats, including threats to close the mine if the Union comes in.

Return to 10-Hour Workday. Another defense in its brief (Br. at 60) is that "Mingo Logan returned its longwall employees to 10-hour shifts because they complained and to increase efficiency," not "to squelch union support by conferring a benefit upon them."

Mingo Logan offers no explanation for deciding at the same time to budget an annual increase in the working hours of 86 other mine employees by 25,112 hours a year (over twice the total increase of 11,232 longwall hours), requiring an annual increase in labor costs of over a third of a million dollars.

Nowhere does Mingo Logan admit that when it reduced the hours of the longwall employees from 10 to 9 hours the first week in October 1993, assigning them a 36-hour workweek about half of the time, it did so to give more outby construction work (then being performed by longwall employees, Tr. 1936, 1943-1944) to the Mahon employees as a cost-cutting measure. As found, some of the longwall employees complained, but their scheduled 9-hour workdays continued for 6 months until April 1994, after Mingo Logan had decided on the layoff of Mahon employees during the Union's organizing campaign.

Regarding the delay in reinstating the 10-hour workday for the longwall employees, Mine Superintendent Frye testified that Mingo Logan discussed having a survey of employee opinions and claimed "we didn't want to go changing a lot of things" before evaluating "what we got back from the survey" (Tr. 1489-1490). He later testified that "we talked about doing a survey . . . around Thanksgiving" 1993, that "the president of our company ultimately decided to do it," and that the survey was taken in January 1994, "Seems like it was early January" (Tr. 1562-1563). The employees began signing union cards in early January (Tr. 617).

It was stipulated that Mingo Logan received the results of the employee/supervisory satisfaction survey on January 31, 1994. Regarding the 10-hour workday, the parties stipulated that only 13 longwall miners (of a total of 40) "expressed a desire to work longer shifts and/or a more balanced schedule." The stipulation reveals that the survey related in part to union representation: that two or three supervisors "expressed as a positive" that Mingo Logan is "union free" and one supervisor "expressed as a negative" that Mingo Logan was "not doing enough to keep the UMW out." (Tr. 699-700.)

Frye did not reinstate the 10-hour day after the survey, explaining that "I normally make changes at the beginning of a quarter" (Tr. 1489-1490). General Mine Foreman Harrison Blankenship, who claimed "There was a lot of grumbling about it," testified that "We had a meeting and decided that we would make the change but it wouldn't be effective until the rotation period" and "there was no need of rotating in the middle of a quarter." When asked about any practical difficulties of putting the change in effect on February 1 (merely adding 1 hour to each shift without rotating the shifts), his answer was, "To be honest with you, I can't give you a good answer on that." (Tr. 1940-1942.) (Undoubtedly if returning to the 10-hour longwall workday was "to increase efficiency," the delay would not have continued.)

These explanations are not convincing. I infer that the real reason for delaying a return to the 10-hour longwall workday until the Mingo Logan president "ultimately decided" to con-

duct the employee satisfaction survey and for continuing the delay on February 1, was the same reason for adopting the 9-hour longwall workday in October—to assign more of the outby work to Mahon employees to save on labor costs.

I find that Mingo Logan reinstated the 10-hour longwall workday and budgeted a larger increase in the scheduled working hours of 86 other employees in implementing its plans to phase out all contract labor in the mine and have an all Mingo Logan work force.

Permit Problem. Another defense in its brief (Br. at 65, 68–69) is that work was not available for the laid-off employees on April 10 because “Mingo Logan could not continue to develop the North Mains area of the mine due to a delay [in January] in obtaining the necessary mining permit.”

This contention refers to the temporary stopping of the North Mains at 86 crosscut (Tr. 700–701, stipulation 8, 1494), which is over 3 miles from the south entrance of the mine and about a mile from the north end, as shown on the mine map (RML Exh. 3). Because the entire life of the mine was about 10 years (being about a fifth developed on April 10, 1994), there were years of development work in the mine south of that stoppage of the North Mains.

Moreover, Frye admitted that “I don’t [believe] this” new budget “changing the longwall people” back to 10 hours “had anything to do with the stopping [of] the Mains, the permitting” problem. (Tr. 1586, 1591–1592.) Frye did not dispute that the budget provided for not only an annual increase of 11,232 longwall hours, but also an annual increase of 25,112 hours of other employees (over twice the increase of longwall hours).

The new budget provided for an increase in the amount of outby work, not a reduction.

Rock Work. Mingo Logan contends in its brief (Br. at 66) that there was less outby work for the Mahon employees on April 10 because it was having its continuous miner crews perform the rock work instead of “leaving most of the rock work for the Mahon construction crews to accomplish.” This contention refers to rock work performed by Mahon employees who followed the Mingo Logan production crews and removed additional rock, with a continuous miner or by blasting, increasing the height of entries for tracks and conveyor belts (Tr. 1225, 1234, 1257–1261, 1396).

Mingo Logan admits in its brief (Br. at 66–67), however, that “By the first quarter of 1994, Mingo Logan production crews were performing 95 percent of the rock work as they advanced” and that “no Mahon employees performed rock work after the first of January 1994.” In view of this admission, I discredit Amon Mahon’s claim that Frye told him before the April 10 layoffs that Mingo Logan was “going to *start* [emphasis added] doing some of the rock work as they took out the coal” and that “for the first time since I’ve been there, that was no longer going to be our work” (Tr. 1056, 1091).

The elimination of Mahon’s rock work, before the union organizing began in early January, had not caused any layoffs from January through April 10.

Although there is little evidence of the working hours of Mahon employees during this time, Belt Foreman Lowell Cook did include on his February 22, 1994 instruction sheet to Mahon crew leader Massey the instruction: “Due to the work

load this week everybody will need to work one of their days off starting Wednesday,” as found. The timesheet of the belt crew for the week ending March 6, 1994 (before the March 29, 1994 longwall move), shows that Massey had 9 hours of overtime and the other Mahon crew members had 5 hours overtime (RM Exh. 6).

Also, during the week ending April 3 (during the longwall move), six of the Mahon employees laid off on April 10 worked from 22 to 24 hours of overtime and five of them from 13 to 15 hours of overtime. One of the other Mahon employees, operator Troy Porter, worked 29 hours of overtime that week (GC Exh. 38 p. 4). There were previous longwall moves on April 18, July 22, September 30, and December 31, 1993 (RML Exh. 5).

Moreover, I find that this purported reason for the April 10 layoffs is an afterthought. There is nothing in Mingo Logan’s lengthy June 6, 1994 statement of position, submitted within 2 months of the layoffs, about the elimination of Mahon’s rock work before 1994 being a cause of the layoffs (Tr. 1577; GC Exh. 42).

Other Construction Work. After referring to the permit problem and the longwall 10-hour shifts and alluding to completion of the construction work connected with the May 29 longwall move, Mingo Logan contends in its brief (Br. at 65) that “the Mahon employees had completed most of the construction work in progress, leaving less work for them to do.” It ignores its decision in the new March 25 budget to not only reinstate the longwall employees’ 10-hour workday, increasing their total annual scheduled hours by 11,232 hours, but also to increase the total annual scheduled hours of 86 other employees by 25,112 hours (over twice that number of hours)—making available *more* working hours for performing outby work.

As found, the new budget provided for Mingo Logan to schedule more working hours for outby construction work, not less.

5. Concluding findings of Mingo Logan’s violations

a. Antiunion hiring policy

The evidence reveals Mingo Logan’s antiunion hiring policy.

As found, Mingo Logan was referring skilled, experienced unemployed union miners to Mahon, rather than hiring them directly. As an example, it refused to hire Dennis Evans and referred him to Mahon, even though he had 14 or 15 years’ experience, had an associates degree in mining technology, and could run “practically any underground mine machinery.” Longwall Superintendent Earl Cooke told him that if he was hired by Mahon, he would have his “foot in the door to get a job with” Mingo Logan.

After Dennis Evans was hired by Mahon and the longwall mining began, he worked about a year on a longwall maintenance team with Mingo Logan employees under Mingo Logan supervision. Seeking Mingo Logan employment, he “sent four or five different resumes to them by various foremen who wanted me on, to no avail.” Finally, as found, Longwall Maintenance Foreman Jewell “tried his best to get me on his team,” but reported back that Mingo Logan was not going to hire him because of his brother, an organizer for the Union.

As found, Belt Foreman Lowell Cook persuaded Mahon employee David Massey to take the responsibility of being the belt crew leader on the promise that “it would be like putting [his] step in the door” for a Mingo Logan job. After Massey worked a short time as crew leader on the owl shift under Cook’s supervision, Cook complimented his work, told him that Cook had not heard any (union) rumors about him, said he deserved another dollar raise, and had Lenville Mahon raise his pay to \$15 an hour. But during the organizing campaign Massey began wearing a union sticker on his hard hat, and he was laid off with other union supporters—instead of being hired by Mingo Logan.

During the organizing drive, as further found, Lowell Cook told Massey that if Mingo Logan found out who signed union cards, they would never be considered to be hired by Mingo Logan. Cook advised other employees who were wearing union stickers on their hard hats: “Boys, I’d take them off . . . it might . . . hurt your chances to get a job” with Mingo Logan. After Mahon employee Harold Bryant stopped wearing the union sticker on his hat, Cook told him “I see you took your sticker off your hat” and added that “there is no way with that sticker on [his] hat” that he would get a job with Mingo Logan. Bryant and the other Mahon employees who wore the stickers on their hats at that time were laid off.

Further confirming Mingo Logan’s antiunion hiring policy, Coordinator David Terry asked Mahon employee Truman Cameron whether he would work nonunion if Mingo Logan gave him a job. Cameron gave an equivocal answer that he “would work either way it went.” Terry then asked why he supported the Union and he replied, “I was always a union man.” (Tr. 513–514.) Cameron was in the group of 17 cardsigners who were laid off.

b. Antiunion campaign against the Union

Mingo Logan contends in its brief (Br. at 64, 77) that the timing of the layoffs, when the organizing drive was progressing, was “based wholly on the reduction in work for Mahon to do,” that there “is absolutely no evidence that the decision to reduce the scope of Mahon’s work was based on antiunion animus,” and no evidence of any motivation for it to stop the organizing drive.

To the contrary, Mingo Logan’s supervisors carried on an extensive antiunion campaign during the organizing drive, coercively interrogating Mahon employees to identify the union leaders and card signers and threatening their employment.

As examples, in addition to Belt Foreman Lowell Cook’s warning employees about wearing union stickers on their hard hats, Cook repeatedly interrogated crew leader David Massey about his and other Mahon employees signing union cards and instructed Massey to tell his belt crew member that their jobs would be “on the line” if the Union came in.

Cook told employee Dennis Evans that if the Union goes in, Mahon “would go off the hill immediately” and “it was possible” that Mingo Logan would open a new portal at Sharkey Hollow. Cook similarly told Mingo Logan employee Gary Amick that “before they would allow the Union to come in they would shut [the mine] down and reopen another portal around the hill and hire new employees.”

General Mine Foreman Harrison Blankenship told Mahon employee Rupert Smith that “if it went union,” Ashland Oil (the parent company) “would shut the mine down and open up another portal” at Sharkey Hollow. Foremen Carlos Porter and Donald Sparkman and Assistant Foreman Charles McDaniel interrogated Stewart Vint, McDaniel also warned him that “if you get involved you better watch your back because it will mean your job,” and Sparkman threatened to discharge Ralph Jarrell if he signed a union card. Mingo Logan’s supervisors made other statements to Mahon employees, showing its determination to stop the union drive.

c. Selecting employees for layoff

Credited testimony clearly establishes that Mingo Logan participated in selecting the Mahon employees for the layoff on the basis of their union support.

Mine Superintendent Frye admitted informing Amon Mahon about the upcoming layoffs (“a reduction in the needs of his people”) around the time the March 24–25 budget was prepared—“a couple of weeks” before the April 10 layoffs. “Yes, we discussed things of that type,” the “range of numbers and the types of work that would be less needed.” (Tr. 1495–1496.) This would be about the same time that Mahon Assistant Foreman Colegrove revealed to Mahon employee Stewart Vint that Amon Mahon threatened in a meeting (of supervisors) that “we’re going to take 20” or so of the “oldest men” who were “involved in the union activity” and lay them off or fire them “to make them an example to everybody else” and also threatened that employees with union stickers on their hats were “definitely gone.”

Mingo Logan’s direct involvement was revealed shortly afterward, a few days before the April 10 layoffs. Colegrove revealed to Mahon employee Glen Payne that Coordinator David Terry and Lenville Mahon were in the Mahon office going over a list of Mahon employees for a layoff. Colegrove indicated to Payne that Mingo Logan and Mahon were selecting employees based on their union support by saying: “I think I’ve got them straightened out for you [referring to Colegrove’s belief that Payne had not signed a union card], but you better watch who you’re talking to [referring to union supporters].”

Although Mingo Logan contends in its brief (Br. at 65) that it “played no part in the selection of employees for layoff,” other evidence demonstrates that it was determining who would be laid off by controlling the skills of employees to be retained and setting limits on the number of employees in classifications above general laborer.

For over 2 years, Mingo Logan had been utilizing the services of a large number of skilled, experienced union miners on Mahon’s payroll. Many of these skilled employees were classified as operators, for whom it was reimbursing Mahon \$13 an hour (plus an undisclosed contracting fee), as compared to Mahon’s \$12 rate for its general laborers. The operators were performing a wide variety of outby construction and support jobs.

Some of the operators’ jobs related to rock work, which had been gradually taken over by Mingo Logan. According to its brief (Br. at 66–67), “By the first quarter of 1994, Mingo Logan production crews were performing 95 percent of the rock work

as they advanced” and “Although five or six Mahon employees were involved in the rock work in the last quarter of 1993, no Mahon employees performed rock work after the first of January 1994.” The operators were fully occupied performing other mining jobs until April 10, when 14 of them (three of whom were being paid at the \$12 rate because of Mingo Logan’s limitation on their number) and crew leader Massey were laid off.

Referring to Mingo Logan’s decision-making process that week before the layoffs, Frye testified that “We talk about the numbers and the skill levels required,” get the approval of Mine Manager James Mullins, then let Terry know for him to convey that information to Amon Mahon (Tr. 1476–1477).

Terry testified that in his meeting that week with Frye and General Mine Foreman Harrison Blankenship, they concluded that “The need for skilled type people was no longer there. General type people was what was needed to finish the work we had to do.” He testified it was decided in the meeting that the “number of Mahon people to be reduced” was possibly 18 and that on Saturday, April 9, after getting off from work, he met with Amon Mahon about 5:30 p.m. and “I told him that the final number that I had been given was 18,” reducing the number of Mahon employees from 91 to 73. (Tr. 1684–1685.)

Blankenship testified that when he met with Frye and Terry on Thursday, April 7, “we didn’t need all the people we had,” that “we needed less equipment operators” and “more of just general labor,” that “the only decision that we made was a number of people we needed and a few skilled levels [such as firebosses] that we were still going to have to have,” and that they decided the number of Mahon employees needed was 73 (Tr. 1954–1956, 1979).

On examination by Mahon Counsel Oliver, Amon Mahon gave a far different story. He testified that around Wednesday of that week, Frye called him into his office, told him the approximate number to be laid off, and said “I needed to get with Dave Terry and we’d work out their exact staffing needs.” He testified that he then met with Terry and “we worked on the outline together [of the personnel needed] and when we got through with the outline it no longer had these rock people or grade people in it and the outline didn’t have any of those positions anymore . . . [m]ostly operators or \$13 an hour people . . . and I had no more \$13 an hour slots.” (Tr. 1054, 1057–1058, 1137–1138.)

Thus, either version (if true) would show that although Mingo Logan may not have specifically named the employees to be laid off, it did identify them—contrary to Terry’s claim that he “had no idea who the laid-off employees would be”—by their operator classification and by limiting the skills of employees to be retained, such as firebosses.

Mingo Logan’s decision that the skilled operators were no longer needed meant that under its new budget (providing for increased working hours for outby work and phasing out of Mahon employees for an all Mingo Logan work force), the laid-off operators who were paid \$12 and \$13 an hour with “limited health insurance and minimal life insurance but no other benefits” (GC Exh. 38; Mahon brief at 20) would be replaced by Mingo Logan outby employees being paid \$18 an hour, plus full fringe benefits.

I infer that Mingo Logan’s and Mahon’s contradictory stories, of how the layoff decisions were reached, resulted from their efforts to conceal what actually happened: that (1) Mingo Logan decided to reverse its policy of using many Mahon contract employees to do outby work in the mine at a saving of about \$6 an hour, (2) it prepared the March 24–25 budget to phase out the contract labor, increasing its labor costs by over a third of a million dollars a year, (3) it notified Amon Mahon, who decided on a plan to lay off 20 or so of the oldest employees (operators) involved in the union activity, and (4) Terry met with Lenville Mahon (not Amon Mahon) and selected Mahon employees for the layoffs on the basis of their union support.

d. Knowledge of union support

The evidence indicates that at the time Coordinator Terry met with Lenville Mahon in the Mahon office, Mingo Logan and Mahon had reason to believe that most or all of the 17 cardsigners supported the Union.

As found, five of the laid-off employees (crew leader *David Massey* and operators *Harold Bryant*, *Truman Cameron*, *Dennis Hall*, and *Joseph Turner*) had worn union stickers on their hard hats, and Amon Mahon had threatened that employees with union stickers on their hats were “definitely gone.” Operator *Michael Dillon* admitted to Mahon Shift Foreman James Hawkins that he had signed a union card. Mingo Logan’s Foreman Alvin Jewell informed operator *Dennis Evans* he could not be hired because his brother was a union organizer. Mahon Mine Foreman Larry Caldwell talked to operator *Ralph Jarrell* about the union sticker on his car. After operator *Glen Payne* handed back his union card to Mingo Logan electrician Robert Weaver, who witnessed his signature, Mingo Logan’s Foreman Donald Sparkman called him over and said “you better stay away from that guy, he’s trouble, he’ll get you in trouble.” Mingo Logan General Mine Foreman Harrison Blankenship told *Rupert Smith* “he heard that I had signed a union card.”

Thomas Bailey participated in distributing union cards (Tr. 365). Operator *Jerry Canterbury* got into an argument with Mahon Foreman Colegrove, disputing his word and telling him that “I’d be making a lot more money” if “I worked as many hours” with union pay (Tr. 453–454). Mahon knew that *John Eanes’* family were union members and that Eanes had worked at a mine that was closed during the Union’s organizing campaign (Tr. 366–371). General laborer *Jerry Tawney* had union stickers on his car and refused to wear a “Just Say No” sticker (Tr. 405). Operator *Stewart Vint* attended union meetings, talked to employees about union benefits, and tried to get union cards signed (Tr. 164).

Particularly because of the extensive interrogation of Mahon employees by Mingo Logan and Mahon supervisors to identify the union leaders and cardsigners, I infer that when David Terry and Lenville Mahon met in the Mahon office and went over the list of Mahon employees for the layoffs, they knew or suspected that the 15 above-named employees were union supporters and also suspected the two remaining card signers, operators *Buddy Maynor* and *James Osborne*. Maynor had been riding to work with Ralph Jarrell (Tr. 324), whom Foreman Caldwell talked to about the union sticker on his car.

e. Conclusions on violations

The evidence indicates that Mingo Logan caused Mahon to summarily lay off the 18 employees because it knew or suspected that 17 of them were union supporters and because it had decided to phase out the contract employees—despite the increased labor costs of over a third of a million dollars a year—to undercut the Union’s organizing drive and keep its own labor force nonunion.

I therefore find that the General Counsel has made a strong prima facie showing that Mingo Logan was unlawfully motivated when it caused Mahon to lay off the 18 employees on April 10 because of Mahon employees’ support of the Union in the organizing drive. *Wright Line*, 251 NLRB 1083 (1980). Mingo Logan having failed to demonstrate that it would have reduced the number of contract employees in the absence of the Mahon employees’ protected conduct, I find that Mingo Logan discriminatorily caused the layoff of the 18 Mahon employees in violation of Section 8(a)(3) and (1) of the Act.

The complaint alleges that Mingo Logan also unlawfully “improved the benefits of [the] longwall mining employees by increasing the number of hours they worked.”

In view, however, of the outcome of the employee satisfaction survey in January, indicating that fewer than a third of the longwall employees wanted to change the 9-hour workday, I find that the belated reinstatement of the longwall 10-hour workday was not necessarily a benefit. I find instead that it was used as a vehicle for unlawfully implementing its decision to phase out the contract employees, to undercut the Union’s organizing drive and keep its own labor force nonunion.

I therefore do not find that this was a separate violation of the Act.

D. Mahon’s Role in April 10 Layoffs

Besides its unfounded contentions similar to those in Mingo Logan’s brief, Mahon makes two principal contentions in defense of the allegation that it discriminatorily laid off the 18 employees on April 10.

Lack of Knowledge. Relying on Amon Mahon’s testimony (Tr. 1034), Mahon contends in its brief (Br. at 37) that he “did not believe that *any* of his employees were engaged in union activity,” but believed “that the union organizing campaign was directed at Mingo Logan employees only.” To the contrary the parties stipulated at the trial (Tr. 701):

Mahon Enterprises was aware, at least by the time of the April 10, 1994 layoff, that a United Mine Workers of America campaign was taking place among Mingo Logan employees *and* Mahon Enterprises employees. [Emphasis added.]

Moreover, both Mahon and Mingo Logan supervisors were conducting an extensive antiunion campaign, interrogating Mahon employees to identify the union leaders and cardsigners and to undercut the organizing effort.

I discredit Amon Mahon’s claim of lack of knowledge as clearly fabricated.

Ordered Reduction. Mahon contends in its brief (Br. at 45, 54) that it had “valid business reasons” for the April 10 layoffs because Mingo Logan “ordered the reduction of Mahon employees” and “the provider of temporary labor, like Mahon,

does not violate the Act when it complies with the mine operator’s contractual right to demand fewer employees.”

Mahon relies on the Board’s decision in *Capitol EMI Music*, 311 NLRB 997, 998–910 (1993), in which (unlike here) there was “no evidence of culpability on the part of [the temporary employment agency] apart from [its] being a joint employer with [its client]” where the temporary employees worked. The Board held:

[I]n joint employer relationships in which one employer supplies employees to the other, we will find both joint employers liable for an unlawful employee termination (or other discriminatory discipline short of termination) only when the record permits an inference (1) that the nonacting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and (2) that the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it.

That decision is clearly distinguishable. As found, Mahon knew that joint-employer Mingo Logan caused it to lay off the 18 employees for unlawful reasons. Both Mahon and Mingo Logan supervisors had been interrogating Mahon employees to identify the union leaders and cardsigners. After Mine Superintendent Frye notified Amon Mahon of the upcoming reduction of work assigned to Mahon’s employees, Amon Mahon announced in a meeting (of supervisors) that “we’re going to” take “20 guys or so” of “the oldest men . . . involved in the union activity” and lay off or fire them “as an example to everybody else.” A few days before the April 10 layoffs, Lenville Mahon met with Mingo Logan Coordinator David Terry and was going over the names of Mahon employees and selecting employees for the layoffs on the basis of their union support.

Mahon was not an “innocent” joint employer as in *Capitol EMI Music*, without knowledge of the unlawful basis for Mingo Logan’s reducing the work assignment of Mahon employees. To the contrary, as envisioned by the Board in its decision in that case (311 NLRB at 999), this is a case in which Mingo Logan and Mahon perceived “a mutual interest in warding off union representation from the jointly managed employees.”

Mingo Logan was budgeting an annual increase in labor costs of over a third of a million dollars to phase out Mahon employees and go to an all Mingo Logan work force, to stop the Union’s organizing drive and keep its own labor force nonunion. Mahon, in turn, wanted to avoid unionization of its contract labor, and it sought the good will of Mingo Logan to retain as many as possible of its employees in the mine as long as possible.

Under these circumstances Mahon collaborated with Mingo Logan in stopping the organizing drive. It assisted Mingo Logan in identifying the Mahon union leaders and cardsigners, joined in selecting the 17 cardsigners for layoff because of their actual or suspected union support, and laid them off (along with a nonunion employee) to implement Mingo Logan’s decision to begin phasing out the contract labor.

Mahon contends in its brief (Br. at 65) that Mingo Logan “never indicated that Mahon should lay off any specific individuals.” It admits (Br. at 17–18), however, that 14 of the 18

laid-off employees were equipment operators, that they were in the \$13 slot, and that they were laid off because “those slots [were] gone by direction of Mingo Logan.”

Falsely referring again to belt crew leader David Massey as a foreman, Amon Mahon testified (Tr. 1062) that “we got rid of a foreman on the third shift,” used Assistant Foreman Jim Auxier “to take over the belt people,” and laid off Massey (even though Mingo Logan had selected Massey to serve as crew leader). When calling and summarily discharging Massey as 1 of the 18 laid-off employees, as found, Amon Mahon told Massey “it wasn’t [his] doings, he didn’t have a say-so” in laying Massey off. Mingo Logan obviously had directed his layoff because he had been wearing a union sticker on his hard hat.

I find that the General Counsel has made a *prima facie* showing that Mahon was unlawfully motivated when it participated with Mingo Logan in the identification, selection, and layoff of the employees because of Mahon employees’ support of the Union in the organizing drive. Mahon having failed to demonstrate that it would have engaged in this conduct in the absence of the Mahon employees’ protected conduct, I find that Mahon discriminatorily laid off the 18 employees on April 10 in violation of Section 8(a)(3) and (1).

E. Necessary and Appropriate Remedy

The evidence clearly shows that Mingo Logan flouted the Section 7 rights of both Mingo Logan and Mahon employees, depriving them of their statutory right to an uncoerced choice on the question of union representation.

During the union organizing drive, Mingo Logan supervisors had been threatening to close the mine if the Union came in and warning Mahon’s contract employees against supporting the Union if they wanted employment by Mingo Logan (for higher wages and benefits).

On April 10 Mingo Logan caused Mahon to summarily lay off 18 employees, including a crew leader, 14 skilled operators, and 2 other union cardsigners. These sudden, unannounced layoffs, occurring when only about a fifth of the mine had been developed, “stopped the [organizing] drive completely” among both the Mingo Logan and Mahon employees. The international representative who lead the organizing drive credibly testified that the Union did not get a single card signed after the layoffs, because (in his opinion) “It scared everybody to death.” The Union’s April 28 election petition was later withdrawn.

Mingo Logan had decided to phase out Mahon’s contract labor and go to an all Mingo Logan work force, despite the increased labor costs of over a third of a million dollars a year. For about 2 years before the organizing drive, it had been using the contract labor with purposes of (a) keeping its own work force nonunion, (b) saving about \$6 an hour in labor costs, and (c) obtaining the work of skilled, experienced, and unemployed union miners without hiring them directly.

Of course an employer has the right to decide, for lawful reasons, to cease using contract labor. But Mingo Logan’s motivation for phasing out the contract labor, despite the great increase in labor costs, was for the specific purposes of stopping the organizing drive, preventing an uncoerced election, and keeping its own work force nonunion.

Now that Mingo Logan has succeeded in preventing a fair election and keeping its work force nonunion by causing the discriminatory discharge of the 18 Mahon employees, a major problem is how to devise an appropriate remedy for this flouting of employee Section 7 rights. The General Counsel argues in its brief (Br. at 43–44) that “it is highly probable that the discriminatees would have been offered positions with Respondent Mingo Logan” and concludes that it is necessary to “impose an affirmative hiring obligation.” I agree.

The Mahon employees had a reasonable expectation of being hired by Mingo Logan for higher wages and full fringe benefits, but only if they were willing to continue working nonunion.

As found, Mingo Logan Longwall Superintendent Early Cooke referred Dennis Evans to Lenville Mahon, telling him that if hired, he would have his “foot in the door to get a job with” Mingo Logan. When Mingo Logan Belt Foreman Lowell Cook offered David Massey the job of belt crew leader on the owl shift, Massey first declined, stating, “I just wanted to be a belt man.” Massey later took the job when Cook told him “it would be like putting [his] step in the door” for getting a Mingo Logan job.

Meanwhile, Mingo Logan was hiring a large number of the Mahon contract employees. As found, from April 12, 1992, until February 22, 1994 (after the union organizing began in January 1994), it hired a total of 41 Mahon employees. Its supervisors made referenced to Mahon employees about their being hired by Mingo Logan, but put them on notice that Mingo Logan employment would be denied if they were found to be supporting the Union or if they were not willing to continue working nonunion.

Foreman Cook informed crew leader Massey that if Mingo Logan found out who signed union cards they would never be considered to be hired by Mingo Logan. He also told Dennis Hall and other Mahon employees wearing union stickers on their hats, “Boys, I’d take them off . . . it might . . . hurt your chances to get a job” with Mingo Logan. After Harold Bryant removed the sticker from his hat, Cook told him “there is no way with that sticker on [his] hat” that he would get a job with Mingo Logan.

Mingo Logan Coordinator David Terry made it clear during the election campaign that Mingo Logan was seeking employees who would continue to work nonunion. As found, Terry specifically asked Mahon employee Truman Cameron whether he would work nonunion if Mingo Logan gave him a job. Cameron gave an equivocal answer and he was laid off instead.

Although Dennis Evans had been told that working for Mahon would enable him to have his “foot in the door to get a job with” Mingo Logan and even though he “sent four or five different resumes” to Mingo Logan by “various [Mingo Logan] foremen” who wanted him on the payroll and Longwall Maintenance Foreman Jewell “tried his best” to get him on Jewell’s maintenance team, as found, Mingo Logan would not hire him because of his brother, an organizer for the Union. He also was laid off instead.

I find that an appropriate remedy must include a requirement that Mingo Logan offer the discriminatorily laid-off Mahon employees the employment that they had reasonably expected

before Mahon employees supported the Union in the organizing campaign.

In making this finding, I am convinced that in the circumstances of this case, the policies of the Act would not be effectuated by an order requiring Mahon instead to offer reinstatement to them, either at this mine (whether or not any of its employees are still working there), or at a different location. Such a reinstatement would not restore the opportunity for an uncoerced election that Mingo Logan and Mahon employees had before Mingo Logan's unlawful conduct.

Moreover, if Mahon (instead of Mingo Logan) were required to reinstate the laid-off employees at this mine, this would mean that Mingo Logan would profit by such a remedy. When Mingo Logan caused Mahon to lay off the 18 employees, it was reversing its policy of using a large number of contract employees to perform outby work at a saving of about \$6 an hour. It continued that policy until it decided it was necessary to phase out the contract labor to keep its own work force nonunion. Mingo Logan is now paying the higher wages and full fringe benefits to its own employees to perform the work of the laid-off employees. Replacement of these employees by lower-paid Mahon employees would be rewarding Mingo Logan for its unlawful conduct and would not effectuate the purposes of the Act.

Because Mingo Logan's unlawful conduct has precluded any certainty in determining when the laid-off employees would have been hired by Mingo Logan, I find it necessary to assume that in the absence of that conduct, the 18 employees would have been hired by Mingo Logan on April 10, 1994, when the unlawful conduct occurred.

I therefore find that a necessary and appropriate remedy must include an affirmative hiring obligation and backpay from that date.

CONCLUSIONS OF LAW

1. By discriminatorily laying off 18 employees on April 10, 1994, Respondents Mingo Logan Coal Co. and Mahon Enterprises, Inc. have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By coercively interrogating employees, by threatening employees with loss of jobs, closure of the mine, and not hiring mine employees on its own payroll for engaging in union activity, and by otherwise interfering with their right to engage in union activity, Respondent Mingo Logan violated Section 8(a)(1).

3. By coercively interrogating employees, by threatening them with layoff and loss of jobs for engaging in union activity, and by otherwise interfering with their right to engage in union activity, Respondent Mahon violated Section 8(a)(1).

4. Respondents Mingo Logan and Mahon were joint employers of Mahon employees.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent Mingo Logan having caused Respondent Mahon to discriminatorily lay off 18 employees on April 10, 1994, preventing their employment by Mingo Logan, it must offer them employment and make them whole for loss of Mingo Logan earnings and benefits, computed on a quarterly basis from date of their layoff to date of proper offer of employment, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent Mahon having discriminatorily laid off the 18 employees on April 10, 1994, at Respondent Mingo Logan's behest, it must jointly with Mingo Logan make them whole for the loss of earnings and benefits, computed on a quarterly basis from date of their layoff to date of proper offer of employment by Mingo Logan, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]